BULLETIN OF HUMAN RIGHTS

91/1

I. Human rights and humanitarian law
II. Human rights and refugee law

I. *Human rights and humanitarian law*

Human rights and international humanitarian law
Jovica Patrnogic

Human rights and international humanitarian law
Héctor Gros Espiell

Human rights accorded by international humanitarian law
Boško Jakovljević

The protection of the human person under human rights law and humanitarian law
Theodor Meron

Human rights law and international humanitarian law: two coins or two sides of the same coin?
Françoise J. Hampson

Human rights and international humanitarian law
Cornelio Sommaruga

II. *Human rights and refugee law*

Refugees and human rights
G. J. L. Coles

Blurred vision in the rich world and violations of human rights–a critical assessment of the human rights and refugee linkage
Peter Nobel

The rights of refugees under international law
Igor Khokhlov

"Fear of persecution" and the law of human rights
James C. Hathaway

United
Nations

World Campaign for
Human Rights

READEX
FICHE
best copy available

Centre for Human Rights
Geneva

Bulletin of Human Rights
91/1

I. Human rights and humanitarian law
II. Human rights and refugee law

United Nations
New York, 1992

READEX
FICHE

NOTE

The *Bulletin of Human Rights* is published by the Centre for Human Rights in Geneva. Articles may be reprinted without permission provided credit is given and a copy of the publication containing the reprint sent to the Centre for Human Rights, United Nations, Geneva, Switzerland.

*

*   *

The views expressed in the articles contributed to this publication are those of the authors and do not necessarily reflect the views of the United Nations Secretariat.

*

*   *

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

ISSN 0251-7019

CONTENTS

Page

I. HUMAN RIGHTS AND HUMANITARIAN LAW

Human rights and international humanitarian law
Jovica Patrnogic 1

Human rights and international humanitarian law
Héctor Gros Espiell 13

Human rights accorded by international humanitarian law
Boško Jakovljević 25

The protection of the human person under human rights law and humanitarian law
Theodor Meron 33

Human rights law and international humanitarian law: two coins or two sides of the same coin?
Françoise J. Hampson 46

Human rights and international humanitarian law
Cornelio Sommaruga 55

II. HUMAN RIGHTS AND REFUGEE LAW

Refugees and human rights
G. J. L. Coles 63

Blurred vision in the rich world and violations of human rights—a critical assessment of the human rights and refugee linkage
Peter Nobel 74

The rights of refugees under international law
Igor Khokhlov 85

"Fear of persecution" and the law of human rights
James C. Hathaway 98

I. HUMAN RIGHTS AND HUMANITARIAN LAW

Human rights and international humanitarian law

*Jovica Patrnogic**

A. International humanitarian law and war

International humanitarian law (IHL) is the branch of international law dealing with the protection of victims of armed conflict. Its modern development began in 1864 with the conclusion of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. From this modest nucleus a broad code of rules gradually evolved for the protection of basic human rights in time of armed conflict. During its development, IHL not only widened its scope of application to cover more and more categories of war victims, but also encompassed essentially all kinds of armed conflict situations. It was codified as a branch of law in 1949 and 1977.[1]

The Charter of the United Nations in 1945 initiated a new era in international relations and international law. The Charter prohibits the use or threat of force, a principle which is integrated into its particular system of international relations. This means in essence the outlawing of war between States, the only real exceptions being self-defence or military action undertaken with the authorization of the United Nations to preserve peace or suppress aggression.[2]

In 1949, the four Geneva Conventions for the protection of war victims were proposed and adopted. These represent the primary codification and development of the law protecting war victims. The same States that elaborated and adopted the Charter participated in the preparation and adoption of the Geneva Conventions, which became among the most widely ratified of international instruments.

In 1977, two additional Protocols dealing with the protection of victims of international conflicts and internal armed conflicts were adopted.

---

* President, International Institute of Humanitarian Law.

[1] Notes appear at the conclusion of this article.

These circumstances raised questions concerning the place of IHL in a new international order where war was forbidden. Was it really possible to prohibit the use of force, and at the same time regulate how this force could be used in order to be legally justified? This dilemma bothered many scholars and State officials as well as the United Nations system in the period after the end of the Second World War.

But the dilemma was not a real one. Parallel to the efforts to maintain peace and enforce the rule of the prohibition of the use of force, there was an urgent and important need to protect and assist numerous war victims, which could not wait until the principle of the prohibition of the use of force was fully respected. Protection of human lives required action in both fields. While no one challenged the need to build a better world where force was not used, armed conflicts continued to occur at the same rate as in the previous period.

As a consequence of the aforementioned events, there could no longer be a "law of war", because war was outlawed, but there would be an international humanitarian law, protecting the humanitarian principles of the international community in situations of armed conflict.

One of the basic principles of IHL is the equal right of all war victims to protection and assistance. Neither the 1949 nor the 1977 codification of IHL permits distinctions to be made between individual victims of war, i.e. whether they belong to the party of the aggressor or to the party of the victim. Behind the principle of equality lies the need to ensure that all parties to the conflict respect IHL. A party which was not entitled to protection and assistance would not itself be likely to respect it.

This does not, however, prevent persons accused of crimes against peace, crimes against humanity and war crimes from being prosecuted, as stipulated in the Geneva Conventions and their Protocols.[3]

A question which has been discussed is whether the United Nations itself is bound by IHL. Formally, it is a party to neither the Geneva Conventions of 1949 nor the Protocols of 1977. There is no doubt, however, that the United Nations, whether functioning to maintain or restore peace with the use of force, or to engage in various types of peace-keeping operations, is bound to respect the basic humanitarian rules contained in IHL. On the question whether it is necessary and possible for the United Nations to become a party to these instruments, views are divided. Many considered that the United Nations must respect the fundamental humanitarian rules because they are built on respect for human beings and for law, and therefore no specific act of accession was necessary. Others thought that the United Nations, while being bound by IHL, cannot become a party to treaties regulating the use of force, because its main concern is to enforce this principle of the prohibition of the use of force. We consider, however, that the United Nations could and should become a party to the Geneva Conventions of 1949, the

Additional Protocols of 1977, as well as to some other instruments belonging to the sphere of IHL. Some of these instruments have been prepared under the auspices of the United Nations or an organization of the system.[4]

B. Main sources of international humanitarian law

The core of modern IHL is the product of the two codifications undertaken in 1949 and in 1977. The problem with which we are faced today is their wider ratification. While the 1949 Conventions have been ratified or acceded to by almost all members of the international community, the 1977 Protocols have not yet reached that level.[5] There is even official opposition to their ratification by some important States. It should be the task of all those who are concerned with IHL and with humanitarian issues to help convince all States to ratify these Protocols and to make them as universally accepted as the 1949 Conventions. The fact that many provisions contained in the 1977 Protocols are an expression of existing general international law should provide support to the efforts towards securing their universal ratification.

There are, however, many other instruments which are a part of IHL, regulating specific subjects:

The 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare. Today, efforts are being made within the United Nations to prepare a new instrument bearing on the prohibition of the production, stockpiling and sale of chemical weapons, while biological weapons are prohibited today on a wider scale than in 1925. These new efforts are being made under the general heading of disarmament;

The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, prepared under the auspices of UNESCO, dealing with the protection of cultural and intellectual interests of human beings;

The 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques which was made necessary by the development of new techniques of altering the environment, misused for war purposes;

The 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, whose origin is interesting to note. The elaboration of rules on this subject began in 1974, at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. The work was later taken over by the United Nations and made into a special Convention, separate from the 1977 Protocols. This evolution reflects the development which is taking place in the sphere of rules regulating the behaviour of parties in time of armed conflict. There was a division between the so-called Law of Geneva, initiated in 1864, directly protecting war victims, and the so-called Law of The Hague, initiated in 1899 and 1907, regulating the relations between the belligerents' conduct of hostilities and the use of weapons. Many rules of the Law of The Hague have been included in the 1977 Protocols, which are clearly the most recent development of the Law of Geneva. Therefore, there is a tendency towards a merging of the two Laws because even the rules on the behaviour of combatants represent measures to protect war victims.

The 1980 Convention on Weapons is an example of the dual nature of new instruments of law relating to the limitation of the use of force.

The development of IHL, and of human rights law as well, reflects the new trend in international law towards limiting the sovereignty of States in the interest of mankind: respect for the basic human rights of all human beings. Sovereignty seemed to be conceived of in a new way, as a function of this interest, and should not be invoked as an obstacle to the realization of human rights. This is certainly reflected in the provisions of IHL applicable to international armed conflicts as well as in those applicable to non-international armed conflicts. The provisions of IHL relative to the latter are not sufficiently developed, despite the fact that most of the conflicts in the world are of a non-international character (often, however, with varying degrees of international intervention). The need for further development of IHL in this sphere is obvious and it should be promoted along the lines of both the principles of IHL for international armed conflicts and those of human rights law. These two branches should come into play simultaneously, influencing and complementing each other.

C. The relationship between human rights law and international humanitarian law

As far as the development of human rights law is concerned, it is important to note that the International Conference on Human Rights held at Teheran in 1968 recognized the need to protect human rights in all situations that may occur, both in peace and in war, as well as in uncertain situations which might be qualified as neither peace nor war.[6] Since that Conference the United Nations General Assembly has treated the problem of the protection of human beings in time of war under the agenda item entitled "Respect for human rights in armed conflicts". In this way the United Nations has viewed international humanitarian law from the angle of human rights law.

Both international humanitarian law and human rights law have evolved since 1945. A great number of international instruments concerning the protection of human rights have been adopted, in particular the two International Covenants on Human Rights of 1966. As mentioned earlier, international humanitarian law also developed to a great extent, and its codifications of 1949 and 1977 have been concrete achievements. The matter of the relationship between the two types of law is of the highest theoretical and practical importance. I recall that one of the first actions of the newly founded Institute of Humanitarian Law in San Remo was to convene, in September 1970, a Conference on Humanitarian Law whose main subject was "Human Rights as the Basis of International Humanitarian Law".

The reports of many illustrious lawyers and the proceedings of the Conference clearly showed that the Institute had in mind from the very beginning the important issue of this relationship. These two legal systems are different in their origins, development, contents and procedures or methods of implementation, and they are also promoted by different organizations. At the same time, human rights law and international humanitarian law have much in common, and overlap in many objectives: concern for the human being is evident in both. Given the large area of common concern between international humanitarian law and human rights law, effective co-ordination between them assuredly operates for the global benefit of mankind.[7]

One fundamental common link between human rights and international humanitarian law concerns the protection of human persons.

The common basis of this consists of the principle of humanity. This principle is the basic one to be found in international humanitarian law. In the system of basic human rights, humanitarian considerations are widely found, but there are also other considerations.

Because they are destined to protect human beings, the norms for human rights and humanitarian law are protective, prohibitive and preventive.[8]

Having been a part of international law, general principles of this law are applicable to human rights and humanitarian law.

There is another element common to human rights and humanitarian law. Because these are norms destined to protect human beings as individuals their application requires that they should be known. The number of persons to whom each of these systems apply is very great: (*a*) all the persons in the countries concerned, for human rights; (*b*) all the protected persons, or all the persons who are found in the territories where there is an armed conflict, for international humanitarian law. Similarly, the number of persons, and the number of categories of persons, who are called upon to apply the rules, are also very great: (*a*) all the authorities of States parties to international instruments on human rights, including their legislative, executive and judicial branches; (*b*) all the authorities of States involved in armed conflicts, both civilian and military, medical and other services, and also the authorities of insurgents, in the case of civil wars.

For these reasons, common to human rights and humanitarian law is the imperative need to undertake the dissemination of these complex but important rules; this dissemination includes also teaching and training the personnel called upon to implement certain provisions of these instruments. This obligation to undertake dissemination is explicitly formulated only in the instruments of international humanitarian law, and the International Committee of the Red Cross and Red Crescent Movement are the most active factors in their dissemination. Dissemination is not explicitly laid down in the instruments on human rights. However, the organizations which promote human rights are active in the field of dissemination. The United Nations is engaged very much in disseminating human rights law. Many other organizations and institutions are also engaged in the dissemination of this branch of the law.[9]

Beside these general considerations, which indicated that there is much in common to these two branches of law, there are many specific human rights which are common to all of them. Most of these rights are explicitly formulated in instruments, but some of them, certainly applicable, are only implied. We shall indicate, as examples, some of these rights, without being exhaustive:

The right to life;

Prohibition of torture;

The right to humane treatment and the inviolability of the person;

Prohibition of discrimination (however, a certain amount of discrimination is permitted: for example the difference in rights between nationals and aliens, and the preferential treatment of some more vulnerable groups);

The right to health, including the right to medical services;

Fundamental guarantees of persons subject to judicial proceedings;

The right to special protection of categories which are vulnerable, such as children, sick persons, aged persons, invalids;

The right of the family to enjoy special protection;

The right to humanitarian assistance, in case the basic needs are not satisfied.

This short list shows clearly that there is much in common between human rights and humanitarian law, when looking at their substance. However, the formulation of these various rights in their instruments may be different, being adapted to the specific situations in which the protected persons are found.

From this list it is also obvious that there are certain rights contained in one branch, which cannot be found in the other, because their enjoyment would not be in conformity with the status of the persons concerned. As an example, the enjoyment of political rights by persons in prisoner-of-war camps. The rights which are common, and those which are specific for one of these branches, could be determined only after a careful and systematic analysis of the main instruments of each of them.

While there are differences between human rights law and international humanitarian law applicable in armed conflicts, there is also much in common. The elements which are common in our view are predominant; these branches of law belong to the same type of international rules protecting human beings.

It is also clear that although complementary, the rules contained in these branches may differ very much in their specific forms and contents. Their relationship also is not always clearly established, so that there may be cases in which it is not clear whether some norms from another branch are applicable. The implementation of the two systems is usually carried out separately. All this creates inefficiency and uncertainty, which is not in the interest of persons to be protected. Their interest would be that both systems should apply simultaneously, with the effect to ensure better and fuller protection for human beings.

This is, however, a challenge for the international community. New efforts should be made in order to harmonize humanitarian law with human rights: to see where the differences in concept are, to endeavour to remove these differences, to co-ordinate in particular the different fields of application and their systems for implementing the various measures, and to develop additional rules, when necessary. Human beings, exposed to various aspects of suffering, have the right to demand that such an effort be undertaken. The human person is unique, thus the norms protecting his fundamental rights should be much better unified and harmonized. The beneficiaries of such an effort would be human beings all over the world, found in different situations, but all having the same basic rights.

D. Enforcement—Implementation

A general problem of all branches of international law is that of their enforcement. It is a weakness also of IHL. The necessity to find ways and means to ensure respect for the law is the most urgent task for all those who are concerned with IHL. And who are they? All the States parties to the IHL treaties, the ICRC as one of the main bodies acting to develop and apply IHL, the whole International Red Cross and Red Crescent Movement, the United Nations and the organs of its system, the main intergovernmental regional organizations and various non-international organizations concerned with humanitarian issues. These issues are so grave that the greatest effort should be made by each of the bodies, within their spheres of competence, and also in a more co-ordinated way, so that they may give better results.

In the framework of international law at its present stage of reaffirmation and development, the possibilities of ensuring implementation of the international protection of human rights and humanitarian law by international organs and institutions have favourably increased and their fields of competence for taking effective enforcement measures have been widely accepted and recognized.

As I stressed, to make international protection more effective, much emphasis should be placed on the dissemination and teaching among peoples all over the world of the principles and rules contained in international treaties and standard-setting documents relating to human rights and humanitarian law. In this regard, I think that special attention should be given in international organizations and institutions to the education of young people in the spirit of peace and respect for human rights.[9] We can reaffirm today how right Professor E. Hambro, President of the General Assembly at its twenty-fifth session, was, in declaring that "education is essential, because human rights are not granted, they are asserted by individuals who are aware of them". But also to have in mind what Gustave Moynier said: "What is called the 'law of war' is, essentially, a barrier against the abuse of force, a brake put on the unleashing of bestial passions aroused by the heat of battle; it is therefore necessary, after proclaiming this law, to take special measures to get it into the mind and the conscience of any society willing to pursue its end by war . . . It is an illusion to believe that last-minute preachings of moderation to men already excited by the smell of powder, will bring any worthwhile result".[10]

The problems of the application of IHL are so fundamentally important for the whole of mankind and the defence of basic humanitarian standards in all parts of the world that it requires action in many fields and by many agents to study IHL and its scope in order to determine the rights and duties of all elements involved in its implementation, to disseminate its contents as widely as possible, but in particular in the circles which are called upon to apply it directly, such as armed forces and government officials, to train the necessary cadres, to indicate the main problems of their application and further development and to suggest measures to be taken.[11]

The implementation of international humanitarian law is a universal ideal and is indeed generally agreed to be a noble one. States rate the implementation of international humanitarian law very highly. This is particularly evident when one notes that the Geneva Conventions of 12 August 1949 became universally accepted humanitarian standards, while their Additional Protocols of 8 June 1977 have been ratified by a great number of States. However, it would appear to be relatively easier to accede to international humanitarian law instruments than to actually implement them.

States are in different degrees of development—political, economic, industrial, social, etc. It is therefore difficult—if not impossible—to expect all States to accord the same measure of recognition and practical implementation to international humanitarian law. The universal ideal of achieving effective protection of human rights and fundamental freedoms on a worldwide scale in the near future can never be translated into practical reality on a global scale so long as so many diverse political philosophies are practised in different parts of the world. In some systems the idea of human rights is a relative and secondary concept.

In those countries where human rights are restricted or unfortunately non-existent, the emphasis is on broadening the authority of the State even further and therefore on limiting still more the very narrow scope of human rights; whereas in those countries where human rights are treated as acquired, maximum protection and governmental powers are controlled far more effectively than anywhere else; the emphasis is on the broadening of human rights still further and at the same time on narrowing the scope of governmental authority even further.

This would indicate a paradox: surely in countries where there is restriction of human rights, there should be a restriction on governmental authority. Perhaps the answer lies in the suggestion that in certain countries the ideal of human rights is secondary to economic development and progress. Can one then theorize that societies in different stages of development (both economic and political) should not be asked to conform to the same standard of human rights and logically also to the same standard of implementation of international humanitarian law? Should one try to help a society that is near perfection in terms of the protection of human rights to come still nearer to perfection and leave the other societies in their very imperfect state *vis-à-vis* their human rights or should one concentrate on raising the standards of those that are least developed? This is a difficult question and that is why it is submitted that States place different degrees of importance on the implementation of international humanitarian law. In the hierarchy of multiple problems to be solved, the protection of human rights and the implementation of international humanitarian law by no means appear to present the same degree of urgency everywhere. Individual rights presuppose a minimum standard of existence.

How does one ensure the implementation of international humanitarian law in situations where a particular State and its incumbent Government are threatened with an armed internal rebellion, insurrection, guerrilla warfare, civil war, etc.? The problem here is that no State would want to admit to the international community that it is counter-fighting a full-scale internal war—because if it does then some of the basic provisions of the 1949 Geneva Conventions and the 1977 Protocols would become applicable to such conflicts. Very few States would want to admit this position because in a sense it would involve according a form of recognition to the insurgents and giving them some measure of protection—prohibition on torture, humane treatment, etc.

To codify a standard of conduct of human rights law is to remove it from the realm of pure discretion, to constrain accordingly the scope of the exercise of power politics, and to provide a basis upon which States may be called upon to account for their behaviour. While law provides no guarantee of compliance in a world of sovereign States in which coercive authority is denied to the international community, it none the less creates a context in which respect for basic human rights can be addressed and possibly promoted.

If there are several impediments to the successful implementation of human rights provisions at the national level, how much more difficult it would be for States to implement international humanitarian law provisions. It is submitted in conclusion that the effective implementation of international humanitarian law depends to a large extent on the level of awareness and of national protection of human rights in each State. The higher the protection accorded to individual rights in a particular country, the higher would be the level of implementation of international humanitarian law in that particular country. Once again the whole issue of successful implementation of humanitarian law revolves around the emphasis or non-emphasis each country lays on human rights in its agenda of priority.

In conclusion it is necessary to underline that various international organizations and institutions have a role to play in the whole of this process of searching for solutions to problems of IHL. The role of the United Nations should be increased in the field of IHL, in particular in putting more weight to the need for respect of IHL. The United Nations should also encourage all those organizations concerned to intensify their work and present to the competent bodies suggestions and contributions for the application of IHL, as well as greater use of human rights machinery for the purpose of achieving the application of this law. There are many factors which could be involved in this process, and it is not possible to name them all. I will use this opportunity to mention only one, as an example, an institution whose field of work is specifically IHL. That is the International Institute of Humanitarian Law in San Remo. This international, independent institution, whose members are persons from all quarters—lawyers, physicians, functionaries of governments and of intergovernmental and non-governmental organizations, scholars recognized for their contribution to IHL, Red Cross and Red Crescent experts, army officers, etc. All these people, coming from various professions and positions with different responsibilities, have been assembled by the Institute in order to contribute to IHL. The Institute, which marked 20 years of action in September 1990, has been engaged in: research regarding the contents of IHL and human rights, their measures of implementation and results achieved in their application and in the study of obstacles to the respect of these branches of law; the training of cadres of various professions which have a key role to play in the application of IHL and human rights; the wide dissemination of human rights and IHL; studying and recommending possible areas of further development of IHL and its harmonization with other branches of law; studying the relationship between the human rights law and IHL and the examination of the role of various international organizations. This work was done by way of meetings—global and regional—devoted to specific questions, courses for the training of cadres, publications as a contribution to the literature on IHL, statements addressed to the international bodies concerned, etc. All this activity certainly contributes to awakening an interest and understanding of IHL and human rights and to reaffirming that there is an indestructible bond between human rights and IHL in order to achieve their fuller application. It shows how many different approaches to IHL are possible, how complex the problems are and how they are connected with other branches of international law and with the activities of so many international organizations.

This description of some of the activities of the International Institute of Humanitarian Law is just an example; there are many other institutions concerned with IHL. The United Nations, while undertaking its own action, should encourage and support the work of these various organizations, while respecting their independence, in order to promote their interest in, and contribution to, the results in the application of IHL. IHL should be taken, in this context, in its wider sense, as a branch concerned with humanitarian issues, not only in case of armed conflicts, but also in many other situations short of war, which require a humanitarian response to the problems of suffering people. This will certainly be a contribution to the respect for human rights, because IHL is a code of law protecting basic human rights in exceptional situations in which human beings are exposed to great suffering. The international community should pay full attention to the destiny of man in such situations which are so common and which require special action on the part of that community.

In view of their complexity and importance, the problems of IHL call for various measures, including their being incorporated in the programme of the United Nations Decade of International Law.

NOTES

[1] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949;

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949;

Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949;

Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949;

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977;

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), of 8 June 1977.

[2] See Articles 1, 2, 24, 39, 41, 42, 43, 45, 51 of the Charter of the United Nations.

[3] See in particular article 12 of the First, article 12 of the Second, article 16 of the Third and article 27 of the Fourth Geneva Conventions, as well as articles 51 and 75 of Protocol I and article 4 of Protocol II.

[4] For instance the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 1980, and the UNESCO Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

[5] 164 States are parties to the Geneva Conventions (31 December 1990) while 99 States are parties to Protocol I and 89 to Protocol II (31 December 1990).

[6] See "Proclamation of Teheran", proclaimed by the International Conference on Human Rights at Teheran on 13 May 1968.

[7] See *Proceedings of the International Conference on Humanitarian Law*, "Human Rights as the basis of International Humanitarian Law", San Remo 24-27 September 1970, Grassi Istituto Editoriale Ticinese, Lugano, Svizzera.

[8] See J. Patrnogic: "Thoughts on the relationship between International Humanitarian Law and Refugee Law, their promotion and dissemination", *International Review of the Red Cross*, July-August 1988.

[9] The International Institute of Humanitarian Law, under the auspices of the Division of Human Rights of the United Nations and the Italian Government, organized from 28 August to 10 September 1973 at San Remo the first international seminar on youth and human rights.

[10] See *Annuaire de l'Institut de Droit International 1878-9*.

[11] See notably article 127 of the Third Geneva Convention, article 144 of the Fourth Geneva Convention and articles 82 and 83 of Protocol I.

Human rights and international humanitarian law

*Héctor Gros Espiell**

I

There is currently a clear need for a proper understanding of these two expressions for the purpose of determining their common features and interrelationship. Their constant use with different and conflicting meanings, depending on the case, as well as their growing use not only in technical and legal language but also in ordinary conversation, calls for an attempt at clarification and terminological and conceptual precision based on the information produced by law and legal thinking in this field today.

II

Various theoretical works[1] have concentrated on determining the relationship between these two concepts and identifying their similarities and differences. They have undoubtedly helped to clarify the topic and have especially provided elements for a better approach to studying and analysing them today.

However, the persisting doubts and confusion fully justify a more vigorous attempt at conceptual precision.

---

*Professor at the University of Montevideo (Uruguay), Minister for Foreign Affairs (Uruguay), Vice-President of the International Institute of Humanitarian Law (San Remo), member of the Board of the International Institute of Human Rights (Strasbourg), member of the Board of the Inter-American Institute of Human Rights (San José, Costa Rica), former President of the Inter-American Court of Human Rights, former Special Rapporteur and Special Envoy of the United Nations Commission on Human Rights.

[1] Notes appear at the conclusion of this article.

III

In the first place, it must be borne in mind that, in these two expressions in Spanish (''*derechos humanos*'' and ''*derecho internacional humanitario*'') the term ''*derecho*'' is not being used in the same way. When we speak of ''*derechos humanos*'' (human rights), we are using the word ''*derechos*'' (rights) in a subjective sense, meaning attributions or faculties which human beings possess because they are recognized by internal and/or by international law. On the other hand, in the expressions ''*derecho internacional humanitario*'' (international humanitarian law) and ''*derecho internacional de los refugiados*'' (international refugee law), the term ''*derecho*'' (law) is being used in an objective sense, meaning a set of principles and rules which, under international law, govern matters relating to the protection of individuals in armed conflicts, both international and internal, which special reference to the contents of the 1949 Geneva Conventions and the two 1977 Protocols and to the protection of refugees, based in particular on the 1951 Convention and the 1967 Protocol.

This is why, in order to standardize the terminology, we would have to say, when referring to the objective meaning of the term ''*derecho*'', ''*derecho internacional de los derechos humanos*'' and ''*derecho internacional humanitario*'' (''international human rights law'' and ''international humanitarian law'').

On the other hand, if we use the term ''*derecho*'' in its subjective sense, we would have to use the terms ''*derechos humanos*'' and ''*derechos de los combatientes y de las poblaciones civiles en caso de conflictos armados*'' (''human rights'' and ''rights of combatants and civilian populations in cases of armed conflict'').

The conceptual implications of this terminological clarification become extremely important when Latin, Spanish, French, Italian, German or the Slavic languages are used, since these are languages in which the same words (*ius, derecho, droit, recht, pravo*) have both meanings: the one representing the objective concept of ''*derecho*'' and the other representing the subjective idea of the word.[7] In English, however, it is difficult for such confusion to arise because ''*derecho*'' in its objective sense is called ''law'', while the term in the subjective sense is ''right''.

Thus, in Spanish, and also in Latin, French, Italian and German, when we speak of ''*derechos humanos*'' and ''*derecho internacional humanitario*'', we are giving the term ''*derecho*'' a different meaning in each case. To standardize the two expressions on the basis of a common terminology, we must therefore speak of ''*derecho internacional de los derechos humanos*'' (international human rights law) and ''*derecho internacional humanitario*'' (international humanitarian law).

This simple and obvious clarification of terminology naturally adds nothing new to the analysis of the topic. However, it does permit a better approach to its study by clearing up the confusion that generally arises.

IV

Whatever the philosophical, political or legal theory or system on which they are based, human rights are the basic faculties, powers and needs of every human being which are declared, recognized or attributed by the legal order and which, resulting as they do from the eminent dignity of every human being, are now the essential and necessary basis for any national political organization or system and for the international community itself.

Putting forward the possibility of a common and universal ideal in the field of human rights, as proclaimed by the Universal Declaration of Human Rights, means recognizing the inescapable fact that various approaches to the subject exist, under current theory and in the light of the existing international situation.[3]

The concept of human rights today includes the classic civil and political rights, i.e. the traditional public freedoms, the economic, social and cultural rights which require the State to provide services in order to satisfy human needs in the economic, social and cultural areas, and the new rights that have arisen in response to the requirements of the modern world, especially in respect of the problems of development, the environment, peace, self-determination, etc.

As the United Nations General Assembly has stated, these rights are interdependent, since each right and category of rights requires recognition and enforcement of the others in order to exist. Freedom exists only when it can be exercised by a human being free of fear, want, hunger, insecurity and lack of culture. Conversely, economic, social and cultural rights take on their full meaning, with full respect for human dignity, only when they can be exercised by a free person who is not subject to arbitrariness, despotism or discrimination.

The rights of every human being can only really exist as a result of the enforcement of a legal order, with their exercise being limited by the rights of others and the requirements of coexistence, in conformity with standards set forth by law according to the general interest, without discrimination of any kind.

V

Human rights are the legal expression of life. Without human life, there can be no human rights and, since life means free and dignified existence in the framework of a legal order that ensures the harmonious coexistence of rights and duties, the purpose of recognizing and safeguarding human rights is to ensure the possibility of living fully and completely, in dignity and freedom.

The right to live, which includes but is broader than the traditional concept of the right to life, as recognized in the relevant international instruments,[3][a] is the source of and serves as the basis for all human rights. But since human life—which implies awareness of life itself—can exist only in an appropriate environment, the right to live, which is both an individual and a collective right of all individuals, all political communities and mankind as a whole, gives rise to the right to a healthy and ecologically balanced environment. In view of the distressing state of the environment at the present time, the right to live and the right to a healthy environment have taken on a crucial role and are the basis for all of human rights law and humanitarian law.

VI

The declaration, protection and promotion of human rights is primarily the responsibility of internal law, since it is in and by the State, whose existence and security is the basis for the actual existence of human rights, that legislation is drawn up to govern and safeguard such rights.

But in view of the possibility of human rights violations resulting from actions by the State, which is nevertheless not the only conceivable source of such violations, international law, in either its universal or its regional aspect, also safeguards and promotes the realization of and respect for human rights.

The human rights issue has thus ceased to be a matter reserved exclusively to the internal jurisdiction of States and has come, as is currently recognized, to be a matter which is governed both by internal law and by international law and in respect of which the exception of internal or reserved jurisdiction cannot be invoked.

VII

The set of principles and rules which, in contemporary international law, govern the human rights issue is called "international human rights law".

Its sources are to be found in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights, the Optional Protocol to the International Covenant on Civil and Political Rights and a wide range of conventional and non-conventional instruments drafted by the United Nations and some of its specialized agencies, particularly ILO and UNESCO.

In addition to these texts of a universal character, there are international documents of a regional nature, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, the American Declaration on the Rights and Duties of Man and texts produced by the League of Arab States and the Organization of African Unity, among others.

This international human rights law, which is one of the fastest-growing and most dynamic branches of international law, contains various systems of implementation, with a complete structure and organization, in both the universal and regional spheres.

VIII

In a very broad sense, international human rights law can be considered as including all international rules and principles aimed at protecting and safeguarding the rights of individuals—whatever their legal status (civilians, military staff, nationals, aliens, men, women, combatants, non-combatants, etc.), at any time (peace, war, civil war, insurrection, etc.), both in the territory of the country of which they are nationals or residents and abroad, and whatever the reason they have decided to leave that country and enter another.

However, this extremely broad and comprehensive concept, although not conceptually erroneous if its meaning is clearly explained, contradicts the fact that there are different branches of international law that are designed to protect persons in different situations. This is why its use without the appropriate clarifications may lead to vagueness and conflicting reasoning and create dangerous confusion.

Taking due account of these differentiating characteristics, dissimilar situations and different and not always comparable systems of implementation, however, it must be recognized that both the protection of human rights in general, which derives from the relevant universal and regional instruments, and the protection of the rights of persons under international humanitarian law are parts—or specific sectors—of a general international system which is basically of a humanitarian nature and aimed at protecting human beings as broadly and comprehensively as is compatible with the existence of the legal order and legitimate rights of the State and the international community.

This general system, which takes the individual as the subject of internationally guaranteed rights, although his legal capacity differs according to the different cases and situations existing under international human rights law *stricto sensu* and under international humanitarian law, is based on shared common principles that shape the various branches of international law aimed at protecting and safeguarding the rights of the human person. There may be particular principles or standards whose application is required only in some of these branches of international law, as is the case in particular for humanitarian law,[4] but it cannot be denied—and it would be extremely serious to do so—that there are general principles which are common to all of them and which link them on the basis of the essential objective of protecting and safeguarding the dignity and integrity of human beings.[5]

IX

We shall first consider the question of international human rights law and what it known as international humanitarian law.

This body of law, which is sometimes referred to as Geneva law, is based essentially on the four 1949 Geneva Conventions and on the two 1977 Protocols. It may be considered part of what is known as the law of armed conflict, although, in the strict sense, this latter body of law, which is known as Hague law and derives from the fourth Hague Convention of 1907 and its Annex, establishes the rules that belligerents are required to observe on the basis of the principle that the parties to a warlike conflict do not have an unlimited and discretionary range of means of combating the enemy. However, this body of law is not composed only of the Hague rules, as it should also be regarded as including the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, of 12 April 1972, and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, of October 1980.

In the broad sense, the humanitarian rules cover both the conduct of military operations (methods and means of combat) and the protection of the victims of conflicts (the wounded, the sick, prisoners, civilian populations, etc.). In the narrow sense, however, international humanitarian law means the body of law based on the 1949 Geneva Conventions and the 1977 Additional Protocols, i.e., Geneva law, which differs, because of the specific régime for its enforcement, from what is known as Hague law.

However, once this necessary clarification has been made, it is essential to avoid the mistake of confronting Geneva law and Hague law, as both constitute the law of armed conflict, and, although they do not have the same focus and are aimed at different immediate objectives, they are based on the same principles and have a common ultimate objective.[6]

The relationship between international humanitarian law and international human rights law and the recognition that both are based on the same general principles designed to safeguard the human person have been accepted in current legal doctrine.[7]

It has rightly been pointed out that, although the Red Cross has only exceptionally invoked human rights[8] and its action has specific and particular features, its work has always been designed to ensure respect for certain basic human rights.[9]

In comparison with the general nature of international human rights law, which refers to the existence of rights to which all natural persons are entitled in all situations,[10] international humanitarian law applies only in certain specific circumstances (international or internal armed conflict and certain specifically designated situations) (arts. 2 and 3 common to the 1949 Conventions and art.1 of Protocols I and II of 1977) and its rules apply only to persons protected as a result of such situations in the circumstances specifically provided for in the 1949 Conventions and the 1977 Protocols (the sick, the shipwrecked, prisoners of war, the wounded, civilian populations, refugees, stateless persons, etc.). However, international human rights law and international humanitarian law do overlap, although their scope *ratione materiae*—and *ratione personae*—are not completely identical, and there is thus a need for different implementation and monitoring mechanisms for the two different situations.

International humanitarian law and international human rights law have not had the same historical development.

The former is based on the Geneva Conventions of 1864, 1899 and 1929 and includes the 1949 Conventions and the 1977 Protocols, as well as the 1907 Hague Conventions and the other rules already mentioned, which, although they do not relate directly to the fate of human beings affected by war, but to military operations, also have the ultimate objective of protecting human beings.

Even though there were some earlier instruments, international human rights law is based primarily on the Charter of the United Nations, the Universal Declaration of Human Rights, the American Declaration on the Rights and Duties of Man, the European Convention on Human Rights, the American Convention on Human Rights, the two Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights.

However, during this different but parallel development, which does not prevent us from determining that the 1864 Geneva Convention already embodied the basic principle of human rights and the need for their universal and non-discriminatory recognition by establishing the obligation to treat all wounded persons in the same manner, whether they are from one's own or from the enemy side, the links and interrelations have been strengthened, particularly in recent years,[11] as a result of the existence of common principles. This *rapprochement* has nevertheless taken place on the basis of recognition of the importance of maintaining two different régimes with different implementation criteria and procedures.

It also has to be borne in mind that, in armed conflict, the implementation of international humanitarian law does not necessarily rule out the implementation of the general rules of international human rights law. Human beings may be considered to be protected by both sets of rules. In situations not covered by international humanitarian law, all human beings are protected by international human rights law, although, "in time of public emergency which threatens the life of the nation", such as internal or international armed conflict, the obligation to guarantee the exercise of certain rights may be suspended "to the extent strictly required by the exigencies of the situation".[12] This emergency régime may, however, never allow the suspension of the duty of every State always to respect the right to life, not to use torture or other cruel, inhuman or degrading treatment or punishment, not to allow slavery or servitude and to recognize the legal personality of all persons. These fundamental rights, from which no derogation is possible and which must be observed in all situations and circumstances, are the cornerstone of respect for human rights. They are genuine contemporary examples of *jus cogens*, i.e. peremptory norms which have been accepted by the international community as a whole and whose violation invalidates any legal act that is contrary to them.[13]

In the specific situations covered by international humanitarian law, the individuals to whom it applies enjoy, *ab initio*, the guarantees provided for by humanitarian law, even though they are subsidiarily also protected by international human rights law, which also applies in such situations to individuals who, *rationae personae*, would not be specifically protected by international humanitarian law.

This convergence and basic unity of international human rights law *stricto sensu* and international humanitarian law are further confirmed by the fact that the International Committee of the Red Cross has, in accordance with humanitarian principles but without any legal basis in the Geneva Conventions, extended its protective activity to political detainees or prisoners, even when they are imprisoned not as a result of an armed conflict but as a result of political repression. This is a case in which international humanitarian law intended to protect certain basic human rights (life, liberty, the right not to be tortured and not to suffer degrading treatment) has been applied by the Red Cross, a body that forms part of the system of international humanitarian law, in circumstances other than those which have traditionally come within the scope of this body of law *ratione materiae* and *ratione personae*.

The existing situation and the efforts being made to expand the role of the Red Cross with regard to the protection of human rights, which were above all apparent immediately prior to and at the 1981 Manila Conference,[14] show that there is a close and necessary link between international human rights law and international humanitarian law.

X

International humanitarian law *stricto sensu* has an implementation and monitoring system established by articles 8 to 11 (common) of the four 1949 Geneva Conventions.

This system is based mainly on the institution of the "Protecting Powers" (art. 8), whose activities include a *sui generis* procedure, of good offices (art. 11) through the International Committee of the Red Cross or any other impartial humanitarian organization accepted by the parties to the conflict (art. 9) and, in certain circumstances, through neutral States (art. 10, second para.).

This system and these implementation and monitoring bodies are exclusive to international humanitarian law and their activities are not included in the procedures followed for the implementation of human rights law *stricto sensu*, which has different bodies to implement its principles and rules at the universal and regional levels. Thus, the United Nations General Assembly, the Economic and Social Council, the Commission on Human Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Human Rights Committee established by the International Covenant on Civil and Political Rights, the Committee on the Elimination of Racial Discrimination, the European Commission on Human Rights and/or the European Court of Human Rights, the Inter-American Commission on Human Rights or the Inter-American Court of Human Rights, for example, do not apply international humanitarian law, just as the Protecting Powers and the International Committee of the Red Cross do not apply international human rights law.

However, this does not mean that an organ of an international organization whose field of competence includes the protection and promotion of human rights may not invoke or take a decision relating to a violation of international humanitarian law or refer to that branch of international law, as the General Assembly[15] and the Commission on Human Rights have repeatedly done, or that an organ of the Red Cross system, such as the International Conference, may not, as it too has done, invoke matters relating to respect for and safeguards of human rights in general.

XI

Despite the variety of normative régimes, terminological differences, the existence of different implementation and monitoring bodies and recognition of the particular features that characterize the two branches of international law to which we have referred, we must not overlook their basic unity. This unity is attributable to common general principles and the fact that the two branches owe their existence to the need to defend, guarantee and protect human rights in general and in specific situations that require special treatment. Although contemporary international law uses different means and procedures depending on the case, it adopts a common, overall approach in trying, through international human rights law *stricto sensu* and international humanitarian law, to ensure the full realization of human rights at all times and in all circumstances.

NOTES

[1] Y. Dinstein, *The Law of Armed Conflict and Human Rights: Convergence and Integration*, International Institute of Human Rights, sixth course, Strasbourg, 1974; G. Best, *The Law of Armed Conflict and Human Rights*, International Institute of Human Rights, Selected Readings on the International and Comparative Law of Human Rights, Strasbourg, 1976; P. Weiss, *The Office of the United Nations High Commissioner for Refugees and Human Rights*, International Institute of Human Rights, *op. cit.*; E. Giraud, "Le respect des droits de l'homme dans la guerre internationale et dans la guerre civile", *Revue de Droit Public et de la Science Politique*, Paris, July-August 1958; I. P. Blishchenko, "Conflit armé et protection des droits de l'homme", *Revue de Droit Contemporain*, 1977, 1; E. P. Syquia, *Human Rights and Refugees, Five Papers on World Affairs*, Manila, 1981; S. Junod, *Les droits de l'Homme et le Protocole II*, International Institute of Humanitarian Law, San Remo round table, 1981; Swedish Red Cross, *Les droits de l'homme: Nécessité d'une approche plus active de la part de la Croix-Rouge*, International Institute of Humanitarian Law, San Remo round table, 1981; J. Freymond, *Sécurité et droits de l'homme*, ICRC; D. Schindler, *El Comité Internacional de la Cruz Roja y los Derechos Humanos*, ICRC, January-February 1979; J. Moreillon, *Les principes fondamentaux de la Croix-Rouge, paix et droits de l'homme*; S. McBride, "Human rights

in armed conflicts", *Revue de Droit Pénal Militaire et de Droit de la Guerre*, Brussels, IX-2, 1970; J. Patmogic, "Les Nations Unies et le respect des droits de l'homme en période de conflit armé", *Jugoslovenska Revija za Medunarodno Pravo*, Belgrade, 2-3, 1970; C. Pilloud, *La Déclaration universelle des Droits de l'Homme et les conventions internationales protégeant les victimes de la guerre*, ICRC, 1949; M. Alexie et P. H. Ibriescu, "Quelques considérations sur la protection des droits de l'homme en période de conflits armés", *Revue Roumaine d'Etudes Internationales*, Bucharest, vol. 10, No. 4, 1976; International Commission of Jurists, "Les droits de l'homme, le droit de la guerre et les conflits armés", *Bulletin of the International Commission of Jurists*, No. 35, 1968; E. David, "Droits de l'homme et droit humanitaire", *Revue de l'Institut de Sociologie*, Brussels, No. 1, 1977; Y. Dinstein, "The International Law of Inter-State War and Human Rights", *Israel Yearbook of Human Rights*, Tel Aviv, vol. 7, 1977; P. Geouffre de la Pradelle, *Droits des hommes et conflits armés: A propos du 500e anniversaire de Las Casas*, ICRC, 1977; H. Meyrowitz, "Le droit de la guerre et les droits de l'homme", *Revue du Droit Public et de la Science Politique en France et à l'étranger*, Paris, September-October 1972; K. J. Partsch, "La protection internationale des droits de l'homme et les Conventions de Genève de la Croix-Rouge", *Revue internationale de Droit Comparé*, Paris, vol. 26, 1974; K. Vasak, *La Convention Européenne des Droits de l'Homme, complément utile des'Conventions de Genève*, ICRC, August 1965; G. H. Aldrich, "Human Rights in Armed Conflicts: Development of the Law", *The Department of State Bulletin*, Washington, vol. 68, 1973.

[2] P. Vinogradoff rightly stated in his *Introduction to Law*: "Such coincidences must not be attributed to mere chance or the misuse of language that may obscure the real meaning of the words. Rather, they show that there is a close link between the two ideas under consideration. The term '*derecho*' has two aspects: on the one hand, all rights derive from the legal order and the legal order is, as it were, the set of all the rights co-ordinated by it". Third Spanish edition, Fondo de Cultura Económica, Mexico, 1963, p. 47. The English edition, dated 1913, is entitled *Common Sense in Law* and was published by Oxford University Press.

[3] H. Gros Espiell, "La evolución del concepto de los derechos humanos: criterios occidentales, socialistas y del Tercer Mundo", *Anuario del Instituto Hispano Luso Americano de Derecho Internacional*, vol. 5, Madrid, 1979, p. 80.

[3a] Héctor Gros Espiell, *The Right to Life and the Right to Live. Essays on the Concept of the Right to Live*, in memory of Yougindra Khushalami, Bruylant, Brussels, 1988.

[4] J. Pictet, *Los Principios de la Cruz Roja* (CICR), Geneva, 1966. See the Proclamation of the Basic Principles of the Red Cross (20th International Conference of the Red Cross, Vienna, 1965).

[5] J. Patmogic, "Inter-relationship between General Principles of International Law and Fundamental Humanitarian Principles Applicable to the Protection of Refugees", *Annales de Droit International Médical*, May 1977; Pictet, *op. cit.*; J. Moreillon, *Les Principes fondamentaux de la Croix-Rouge, paix et droits de l'homme*, sixth round table on current international humanitarian law problems, San Remo, September 1979.

[6] S. E. Nahlik, *Droit dit de Genève et droit de la Haye: Unicité*, AFDI, XXIX, 1978.

[7] In addition to the results of the studies referred to in note 1, it should be pointed out that the UNESCO manual for the teaching of human rights in universities (*Les Dimensions internationales des droits de l'homme*, Paris, 1978) includes the study by Ch. Dominicé, *La mise en oeuvre du droit humanitaire* and many references to the topic in the work of T. Van Boven (*Aperçu du droit international positif des droits de l'homme*, paras. 117-120) and S. P. Marks (*Les principes et normes des droits de l'homme applicables en période d'exception*, paras. 351-368).

[8] For example, Istanbul Declaration, resolutions XIX and XXI, International Conference of the Red Cross.

[9] J. Moreillon, *op. cit.*

[10] Inter-American Seminar on State Security, Human Rights and Humanitarian Law, San

José, 27 September-2 October 1982, Inter-American Institute of Human Rights and International Committee of the Red Cross. General commentary for the participants, 1-3, human rights and international humanitarian law.

[11] Both the United Nations and the International Committee of the Red Cross have contributed to this process of *rapprochement* and interrelationship. As to the United Nations point of view, see: "Respect for Human Rights in Armed Conflict", report by the Secretary-General, document A/31/163, 1976.

[12] The many international texts which contain this provision include article 4 of the United Nations International Covenant on Civil and Political Rights, article 15 of the European Convention, which refers expressly to the case of war, and article 27 of the American Convention, which also refers expressly to the case of war.

[13] H. Gros Espiell, "No discriminación y libre determinación como normas imperativas de derecho internacional", *Anuario del Instituto Hispano Luso Americano de Derecho Internacional*, vol. 6, Madrid, 1980; A. Gómez Robledo, *El Ius Cogens Internacional*, UNAM, Mexico City, 1982.

[14] "Les Droits de l'Homme: Nécessite d'une approche plus active de la part de la Croix-Rouge", working paper submitted by the Swedish Red Cross, International Institute of Human Rights, San Remo, 1981.

[15] See, for example, the General Assembly resolutions on Israeli practices affecting human rights in the occupied territories, which deplore the violation by Israel of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (3525 A and B (XXX), 31/106 A, B and C), as well as the General Assembly resolutions on signatures and ratifications of the 1977 Protocols (32/44, 34/51, etc.).

Human rights accorded by international humanitarian law

*Boško Jakovljević**

I. Introduction

Our time is characterized by the permanent increase in the importance of human rights, both at the national and international level, and of the interdependence of these two levels and their mutual influence. The future of the world depends to a great extent on the fuller realization of human rights universally and on the reduction of respective differences between them in various regions of the world. Human rights certainly influence all branches of international law. Our task is to consider the relationship between human rights law and international humanitarian law.

International humanitarian law is the branch regulating the protection of war victims. It is an old branch of international law, its modern origins dating back to 1864, when the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted, so that it is now 128 years old. Since then, international humanitarian law has shown great development and has achieved a very high level of codification. This was necessary because wars continue to ravage our planet, causing numerous victims.

In many countries and territories there are armed conflicts of different types and sizes and relations between some groups and communities are still conducted by the use of arms; some of these wars last for many years and even decades. There is also a constant growth in the effects of war; new types of weapons and new methods of warfare increase the number of victims and their suffering. One only needs to open any issue of the *International Review of the Red Cross* to see the number of countries affected by war where the Red Cross exerts its humanitarian action. At the same time, the impressive development of international humanitarian law reflects the concern of the international community for the destiny of people affected by armed conflicts, and the efforts made to limit and reduce their effects as well as to attenuate the suffering of human beings.

---

* Special Adviser for International Relations of the Red Cross of Yugoslavia.

International humanitarian law is therefore of current importance, and will continue to be so until the international community is able to eliminate war from human relations. It has attained a very high level of development; the main instruments, the Geneva Conventions for the protection of war victims of 12 August 1949 and the Additional Protocols to these Conventions of 8 June 1977 consist of over 650 articles. Numerous rules establish rights and duties and introduce various types of measures of implementation.

It is important to observe how this development occurred and the driving force behind it. The International Committee of the Red Cross (ICRC), the founding organization of the Red Cross and Red Crescent movement, supported by all the components of the movement, has been not only the initiator of the development, but the basic factor in the elaboration of international instruments, in efforts to achieve their wider ratification, in their implementation and dissemination, and spares no effort in encouraging States and other authorities to respect and implement this law. It acts on behalf of the international community. Therefore, international humanitarian law bears a deep imprint of the Red Cross movement and its basic principle, the principle of humanity. Created, developed and implemented in this way, international humanitarian law is an independent system of law, separate from other branches and autonomous in its implementation.

In the mean time there emerged in the international community an equally impressive system of human rights law, which underwent great development after the foundation of the United Nations in 1945. Under the patronage of the United Nations, all the organizations of the system, and intergovernmental organizatons at the regional level (Europe, America, Africa), there grew up a system of law containing many specific branches, each of them made up of numerous instruments regulating rights of various categories of persons or situations, and including a variety of measures of implementation. Although these various instruments differ, they all represent a whole, the human rights law.

II. Relation between human rights and humanitarian law

The question is now how these two separate legal systems are related. They had known separate development until 1968, when the International Conference on Human Rights was held at Teheran by the United Nations. This Conference represents, in a way, a turning point in this relation. Human rights are a concept not limited to instruments of this branch, but present in many other branches of law, and in many political acts with legal effect, covering all fields of human endeavour and relations. International humanitarian law is also a part of a wider concept of human rights, which is reflected in resolution XXIII, "Respect for human rights in armed conflicts" adopted at the Teheran Conference. A series of resolutions of the General Assembly of the United Nations appeared between 1968 and 1977 under this title.

There is no contradiction between these two approaches, and they do not exclude each other because their relationship is complex and reflects the present-day realities of the world. International humanitarian law and human rights law remain two independent branches, with separate origins, development, types of rules, sponsoring organizations and measures of implementation. However, human rights are a wider concept, of which international humanitarian law is a part. Thus, international humanitarian law also accords human rights, specific for the situation of armed conflicts. In relation to the general system of human rights, international humanitarian law applies only to a specific situation—the armed conflict situation—and enacts rules regulating only certain human rights in a specific way, and to the extent necessary for wartime, which is an exceptional situation. In conformity with this view, we shall examine the human rights accorded by international humanitarian law.

There exist, in the doctrine, two concepts of international humanitarian law—one limited to armed conflicts and the other, wider, covering situations other than armed conflicts, but equally requiring humanitarian rules. We shall, however, limit ourselves here to the traditional concept of international humanitarian law, applicable in armed conflicts only.

III. Specific human rights accorded by international humanitarian law

International humanitarian law changed its character in the two post-war codifications of 1949 and 1977. The main purpose of the rules of modern international humanitarian law is to protect human beings, and to grant and accord them specific rights, which is also the purpose of the human rights law. This was not clear in the instruments of this branch of law prior to the Second World War. In proposing new conventions for the protection of war victims, ICRC was influenced by the doctrinal movement which led to the Universal Declaration of Human Rights of 1948. This concept was only implied in previous conventions. The whole system of rules was conceived in such a way that it centred on individuals and war victims, and the rights of States were present only to the extent necessary in armed conflict situations. Therefore, the 1949 Conventions assume the character of rights accorded to individuals. They can invoke them directly, or through their representatives, to the Detaining Power, the Protecting Power, ICRC or any other organization which may assist them or they can do it independently of their own

State. The 1977 codification even went a step further. It contains rules directly establishing fundamental guarantees for human persons in armed conflict situations, to those persons who do not benefit from more favourable treatment under the 1949 or 1977 Conventions. It is a minimum human rights standard, necessary to safeguard even in time of war, which is the most serious emergency. This character of international humanitarian law is recognized in the works on the subject, both by Red Cross authors and by many others.

The term "international humanitarian law" (IHL) was introduced after the Second World War, and it expresses the new character of this law. The key word is "humanitarian", which determines the character of its rules. Although there is no definition of this term, and there can be various interpretations of its scope, the concept of treaties or rules of a humanitarian character is generally accepted and was recognized also in the Vienna Convention on the Law of Treaties of 1969. We consider that it covers certain basic human rights which are essential for the survival of human beings in emergency situations, when they are exposed to increased danger or the effects of military operations. These rights include the rights to life, protection of physical and mental integrity, health, basic social services, protection of the family as the basic unit of human beings, and fundamental guarantees in case of judicial proceedings. The exact limits of humanitarian rules still have to be explored; they certainly do not include political and many economic rights, but the list of rights that could be qualified as humanitarian could be extended according to specific situations.

The relationship with the basic human rights recognized in international instruments of a general character is, however, complex.

In principle, IHL develops those basic human rights which are found in instruments of a general character, such as the Universal Declaration of Human Rights and the two International Covenants on Human Rights, which have a humanitarian character. In developing them, IHL adapts these basic rights to the specific situations of armed conflict, which require special treatment and in which the dangers for the violation of these rights are different from those in peacetime situations. Endeavouring to achieve this and to establish rules which would enable the basic rights to be respected and implemented, IHL has developed many specific rights of war victims which do not exist—and are not necessary—in peacetime situations and which in some cases make no sense in peacetime, but are very useful in difficult armed conflict cases when basic human rights are denied and the very survival of human beings is at stake. Finally, in developing the law to apply basic human rights of a humanitarian character, IHL departs from some basic rules otherwise valid in peace, because of certain principles of international law applicable in wartime. This is an outline of how human rights are applied in IHL.

To illustrate this complex relationship between human rights and humanitarian law, we shall analyse one of these rights—the fundamental right to life. The lack of space prevents a similar analysis of other basic human rights of humanitarian character, but this example is fairly illustrative of the relationship.

In the International Covenant on Civil and Political Rights the right to life is the first to be recognized, in article 6. It is, however, a brief article, stating that this right shall be protected by law, and that no one shall be arbitrarily deprived of his life. The rest of the article regulates certain aspects of the death penalty to some extent.

The system of IHL is to a great extent elaborated in order to protect the right to life, approaching it from various angles and developing a variety of rules in order to achieve this purpose. The long experience of the Red Cross in protecting and assisting war victims has found full expression in, and has served as a basis for, the elaboration of these rules. Dangers to which human beings are exposed in time of war are far greater than in time of peace, and an effort was made in IHL to foresee these dangers and counter them by imposing rules whose respect would ensure the right to life.

The protection of life is first of all prescribed by an explicit prohibition of wilful killing of the wounded, sick, shipwrecked, prisoners of war and civilian persons protected by the Conventions, of the combatants and members of armed forces who are *hors de combat*, as well as of medical or religious personnel and those of medical units, protected by IHL. There is an important principle here which represents a departure from the general rule granting the right to life. This is the principle of general international law, confirmed in the instruments of the law of armed conflict and of IHL, according to which in the conduct of military operations it is permitted to attack military objectives, which include members of armed forces. The life of these persons is protected only when they are *hors de combat*—wounded, sick, shipwrecked, taken prisoner of war or in any other way in the power of the enemy. Therefore, a wide category of persons in time of war during military operations does not enjoy the protection of life. The essence of war is the destruction of military objectives, in particular of human beings. In the International Covenant on Civil and Political Rights there is a clause permitting derogation from the obligations in cases of "public emergency which threatens the life of the nation". War is certainly the gravest of such emergencies. But no derogation from certain basic rights, including the right to life, is permitted. In any case, even the International Covenant on Civil and Political Rights, one of the basic human rights instruments, recognizes the existence of emergencies in which a special legal régime is in force, different from the rules for normal situations. Because of that principle of customary international law, the wilful killing of members of armed forces, while they are conducting military operations, is not on the list of prohibited acts. Protection extends only to the life of those persons whom IHL protects.

These general rules prohibiting wilful killing are only the starting point. They are supplemented by numerous other rules of which the purpose is to ensure the right to life of protected persons. We shall indicate some of these rules.

The prohibition of wilful killing is reinforced by penal sanctions, which regulate the obligations of contracting States in respect to "grave breaches" of IHL, including their obligation to legislate, to search for persons alleged to have committed such breaches, to bring them before their own courts or to hand them over for trial to another contracting party. Very detailed rules establish an elaborate system of penal sanctions, which, as in all branches of law, aims to prevent such acts, suppress them and punish the perpetrators.

A counterbalance to the principle which permits attacks on military objectives is the principle of protection of the civilian population against any "dangers arising from military operations". This principle is followed by many detailed rules ensuring its application, such as the prohibition of indiscriminate attacks, attacks by way of reprisals, attacks on objects indispensable to the survival of civilians, protection of the natural environment, protection of works and installations containing dangerous elements, and precautions to be taken against the effects of attacks. This is not a complete list of prohibitions, but it serves to illustrate the elaborate system of IHL. Localities and zones under special protection are also established and recognized. Furthermore, many categories of persons, although covered by the general protection of civilians, are placed under special protection, such as children, wounded, sick, etc.

Protection of life is secured by many rules, or specific rights of protected persons, which prohibit torture, inhumane treatment, including biological experiments, the causing of serious injury or great suffering, depriving the protected persons of the right to a fair and regular trial, etc. All these acts may in time of war very easily lead to the loss of life. The prohibition of the taking of hostages serves the same purpose.

IHL does not stop at these rules since it establishes certain specialized services whose purpose is, among other things, to protect life, such as medical services, both military and civilian. Another service, created in 1977, is civil defence; it aims "to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide conditions necessary for its survival". It is obvious that an effective civil defence can spare a great number of lives. Then there is the tracing service, whose primary purpose is to establish contacts between war victims and their families. It includes the obligation of the detaining power to forward information concerning protected persons to the power on which they depend; it serves also to prevent the disappearance of war victims in the hands of the enemy, and compels the detaining power to give account of the treatment accorded to protected persons.

Specific rights of protected persons, established by IHL, include the rules on the right of these persons to address themselves to the Protecting Powers, the International Committee of the Red Cross and all relief societies and organizations, with in the first place the Red Cross and Red Crescent Societies, which may come to their assistance. Very intricate rules on relief actions certainly serve to protect the life of protected persons by enabling them to receive relief indispensable for their survival.

It is not necessary to continue to list the above rules since those mentioned describe clearly the whole legal system of IHL. What do these rules in fact contain? The rights of protected persons, and the corresponding duties of the authorities. For example, they deal with the right of access of prisoners of war to medical services, to demand medication, food, blankets or shelter, to ask for humane treatment, and they invoke the corresponding obligation of the authorities concerned to grant them these rights; they ensure the effective functioning of specialized services, allow them to use shelters in case of attacks, demand humane treatment in case of transfers of prisoners, etc. Every rule could be translated into the specific rights of protected persons. All these specific rights serve to protect life or health, because these two rights are often inseparable. If health is not maintained, if illness is not cured, life may be lost. In this way the basic right to life finds its expression in IHL in numerous specific rights of war victims. They are in fact a system of legal rights, human rights, which every war victim may invoke.

It is equally clear that most of these specific human rights are not prescribed in international instruments as rights for peacetime situations, because they are not necessary.

In non-international armed conflicts, which have been the most frequent in the post-war era, the rules of IHL are much less developed, but they are supplemented by human rights instruments which, according to the 1977 Protocol II of the Geneva Conventions, "offer a basic protection to the human person", indicating the need for parallel application of both systems.

IV. Conclusions

In the contemporary movement towards better protection of human rights, some basic rights of human beings in armed conflicts should never be forgotten, and they are specified in international humanitarian law. The relationship between human rights and international humanitarian law is today, both in theory and in practice, well defined and established, but it is very complex. International humanitarian law is certainly an independent branch, whose origin, promoter, contents, measures and institutions of implementation are specific. But this law has changed its character and has become a system of human rights in war. Thus, international humanitarian law is a part of a wider system of human rights in war, adapted to the specific necessities and conditions of war, contributing to the respect of certain fundamental human rights in the most difficult situations. However, since neither of these systems is sufficiently respected and implemented, there is a need for new efforts not only to ensure their application, but also to harmonize and utilize them simultaneously for the benefit of victims and persons who are entitled to protection and assistance. The measures which are required include a much greater role for the United Nations in the enforcement of international humanitarian law, and greater support for organizations such as the Red Cross and Red Crescent Movement, which help to find appropriate solutions for the fuller application of this law.

The protection of the human person under human rights law and humanitarian law

*Theodor Meron**

I. Introduction

Human rights are stated largely in human rights instruments (treaties and declarations) adopted by the United Nations and its specialized agencies, while humanitarian rights are articulated largely in the Geneva Conventions of 12 August 1949 for the protection of victims of war and the two Additional Protocols of 1977 and in other instruments applicable to armed conflicts. Both human rights and humanitarian norms comprise conventional as well as customary law. Although human rights apply primarily in times of peace and humanitarian norms primarily in times of international or internal conflict, the overlap in their material applicability is growing. There is also a significant convergence and parallelism between norms originating in human rights instruments and those originating in humanitarian instruments. While both types of instrument contain provisions not only regulating relations between the Government and the governed but also governing relations between States by laying down their mutual rights and duties, such latter provisions are much more central to humanitarian instruments.

Ideally, there should be a continuum of norms protecting the rights of the human person in all situations, from international armed conflicts at one end of the spectrum, through internationalized internal armed conflicts, internal armed conflicts, violent internal strife, internal disturbances and tensions, to situations of internal repression at the other. The human person is interested in the substance, not in the label of a protective system of norms. In every situation, there should be either a convergence of human rights and humanitarian norms, or one of these two systems of protection should clearly apply. Any gaps in the area where humanitarian law meshes with human rights law should be filled.

---

* Professor of Law, New York University School of Law.

II. Binding character of positive international law

Until recently, humanitarian law had been codified more systematically than had ordinary peacetime human rights, a fact not surprising in view of the comparative ages of these two systems of law. Human rights instruments are a product of the post-United Nations Charter era, while humanitarian law has more ancient antecedents. Because of the recent proliferation of human rights instruments, the volume of codification and progressive development of human rights law has quickly advanced to match that of humanitarian law.

Some humanitarian law instruments have been accepted far more extensively than human rights instruments as the treaty law of the international community (the Geneva Conventions have been ratified by 164 States). The highest number of parties to any human rights instrument is 129 (the International Convention on the Elimination of All Forms of Racial Discrimination), while the number of States parties to other instruments is significantly lower. Comparisons of the extent of ratifications of human rights and humanitarian instruments must take into account that the former instruments apply to day-to-day life, while the latter govern exceptional situations (armed conflicts).

Norms of customary law bind States which are not parties to the instrument in which the norms are stated. It is generally accepted that the Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention No. IV of 1907 are now part of the corpus of customary international law. While the binding nature of the Geneva Conventions of 1949 is generally based on their status as treaties, many of their provisions reflect customary law. This is true even of the (Fourth) Geneva Convention Relative to the Protection of Civilian Persons in Time of War which, although not preceded by an earlier Geneva Convention on the same subject, echoes many provisions of the Hague Regulations of 1907, including the basic rules on occupation. In the case of *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) (Merits), the International Court of Justice viewed common articles 1 and 3 of the Geneva Conventions as reflecting general principles (i.e., customary law). Except in a limited number of situations, the extent to which provisions of the Conventions are declaratory of customary law is of limited significance because of the universal acceptance of these Conventions as binding treaties. This question is important, however, in countries whose legal systems treat customary law as a part of its internal law, but require an act of parliament for the transformation of a treaty into its internal law. Although the failure of such a country to enact the necessary legislation cannot affect its international obligation to implement the Geneva Conventions, in this situation, invoking a certain norm as customary, rather than conventional, may be useful for the protection of the victims because of the availability of domestic remedies.

This question is also important in the case of the 1977 Protocols Additional to the Geneva Conventions of 1949, the status of which is different from the Conventions. Protocol I has been ratified by 98 States, including two permanent members of the Security Council (China and the Soviet Union), and Protocol II by 88 States. Although the Protocols have introduced several innovations into humanitarian law, many of their provisions codify customary law.

Various provisions of human rights instruments have attained the status of customary law. The 1987 *Restatement of the Foreign Relations Law of the United States* lists several important human rights as norms reflecting customary international law:

> A state violates international law if, as a matter of state policy, it practices, encourages or condones
>
> (*a*) genocide,
>
> (*b*) slavery or slave trade,
>
> (*c*) the murder or causing the disappearance of individuals,
>
> (*d*) torture or other cruel, inhuman or degrading treatment or punishment,
>
> (*e*) prolonged arbitrary detention,
>
> (*f*) systematic racial discrimination, or
>
> (*g*) a consistent pattern of gross violations of internationally recognized human rights.

Point (*g*), it should be noted, opens the door to an expansive interpretation.

The Restatement's list is, of course, open-ended. Through a continuing process of accretion, State practice and *opinio juris* form new customary norms of human rights. The repetition of certain norms in various resolutions, declarations and treaties plays an important role in this process.

III. Growing convergence and other aspects of comparison

Human rights law and humanitarian law have different historical sources and, originally, different jurisprudential underpinnings.

One of the fundamental sources and guiding principles of human rights is the principle of humanity. Although humanitarian considerations are also a powerful motivating force behind the law of armed conflict, these considerations blend with others, such as economic advantage, to create a counterforce to military necessity. The tension between military necessity and restraint on the conduct of belligerents is the hallmark of humanitarian law. The principle of humanitarian restraints, once of limited force, is of growing importance, particularly in the elaboration of new instruments, although, regrettably, not necessarily in actual practice.

Historically, the concept of reciprocity has been central to the development of the law of war and may be regarded both as one of the rationales for the formation of the norms and as an important factor in their efficacy. The position of the principle of reciprocity is, however, considerably different in contemporary humanitarian law.

Although that principle is generally pertinent to the creation of obligations under the Geneva Conventions (see, e.g. common article 2 (3) of the Geneva Conventions or article 4 (2) of the Fourth Geneva Convention), it is hardly pertinent to the termination of obligations. This is demonstrated by the denunciation clause (common articles 62, 63, 142 and 158) of the Geneva Conventions and by article 60 (5) of the Vienna Convention on the Law of Treaties (1969) which provides that "[p]aragraphs 1 to 3 [permitting a party which is the victim of a breach of a treaty to invoke the breach as a ground for terminating the treaty or for suspending its operation] do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". A breach, and consequently the principle of reciprocity, may therefore not be invoked to justify derogations from humanitarian law with regard to protected persons.

Obviously, the post-Charter international human rights instruments have the humanitarian object of international recognition and protection of human rights. This object is achieved through the enunication of various obligations of the contracting States towards persons in their territories and persons subject to their jurisdiction. Human rights instruments, not being subject to the principle of reciprocity, apply even to nationals of non-parties. In this type of instrument the contractual (inter-State) elements are far less important than the objective and normative aspects.

Humanitarian law, while protecting the rights of States and governing their duties, also contains a prominent human rights component. This aspect of the law of war is significantly manifested in the preambular (Martens) clause (fifth paragraph) to the Hague Convention No. IV, which states that "[u]ntil a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience". The Martens clause has been reiterated in several instruments of humanitarian law.

The post-Charter human rights instruments had an influence on the humanitarian character of the Geneva Conventions of 1949. The 1977 Additional Protocols also reveal the influence of international human rights, both in taking those rights into consideration, and in referring explicitly to them. In matters such as the prohibitions of torture and cruel, inhuman, or degrading treatment of punishment, arbitrary arrest and detention, discrimination on grounds of race, sex, language, or religion, and the guarantee of due process, a very large measure of convergence and parallelism exists between norms states in human rights instruments and those stated in instruments on international humanitarian law. There is also growing convergence in the *ratione personae* and *ratione materiae* applicability of these two systems.

Consequently, the fact that these two systems have different historical and doctrinal origins should not obscure the tremendous rapprochement between them which has already taken place. Current trends point to an even greater reliance on the shared idea of humanity.

IV. Derogations and reservations

Humanitarian instruments, having been enacted to govern situations of armed strife, are not subject to derogations, except in the rather narrow context of article 5 of the Fourth Geneva Convention which parallels the limitation clauses of human rights instruments. Imperative military reasons, military necessity, or reasons of security may provide States with certain options, as expressed, for example, in articles 49 (2), 64 (1) or 78 (1) of the Fourth Geneva Convention. Human rights instruments, in contrast, are generally subject to broader derogations in various exceptional situations.

Both humanitarian and human rights instruments are, nevertheless, subject to reservations. Because the Geneva Conventions and the two Additional Protocols do not contain provisions pertaining to reservations, the entering of reservations is subject to customary law, as codified by the Vienna Convention on the Law of Treaties, and, especially by the provisions regarding the compatibility of a reservation with the object and purpose of the treaty. In analysing the scope of permissible reservations, the humanitarian character, *par excellence*, of these conventions must be taken into account.

V. Non-derogable human rights and humanitarian law

The parallelism and divergence of non-derogable norms under the International Covenant on Civil and Political Rights (Political Covenant) during international and non-international armed conflict and norms under the Geneva Conventions and the Additional Protocols merit examination.

The Geneva Conventions and Protocol I (which concerns protection of victims of international armed conflicts) contain a large number of human rights applicable in international armed conflicts. Although not all the non-derogable rights under the Political Covenant have corresponding rights under the Geneva Conventions, the catalogue of non-derogable rights stated in the Political Covenant is, generally, more limited than the totality of human rights recognized by humanitarian instruments.

The right to life, for example, is non-derogable under the Political Covenant. Neither document establishes an absolute guarantee of the right to life but various provisions of both the humanitarian instruments and the Political Covenant attempt to regulate the conditions under which capital punishment may be imposed. The provisions of the two Additional Protocols which forbid the carrying out of the death penalty on pregnant women and mothers of young children are more enlightened than article 6 (5) of the Political Covenant, which does not prohibit the carrying out of the death penalty on mothers of young children. Concerning protection of the right to life by article 6 of the Political Covenant in international armed conflicts, a United Nations study suggested that, "[t]o the extent that in present international law 'lawful acts of war' are recognized, such lawful acts are deemed not to be prohibited by article 6 . . . if they do not violate internationally recognized laws and customs of war." Death resulting from "lawful acts of armed conflict"—as distinguished from deprivation of life as an act of retribution—might not be considered an arbitrary deprivation of life under article 6.

The non-derogable principle of non-discrimination, the prohibition of torture, and the prohibition of retroactive penal measures stated in the Political Covenant appear prominently also in humanitarian instruments. The prohibition of slavery and servitude in article 8 of the Political Covenant, which is also non-derogable, has a counterpart in article 4 (2) (*f*) of Protocol II, which concerns the protection of victims of non-international armed conflicts. A number of other provisions of humanitarian instruments which regulate the scope and the conditions of labour are also relevant.

The non-derogable prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation, contained in article 11 of the Political Covenant, has no counterpart in the Geneva Conventions. Article 16 of the Political Covenant, which provides that everyone shall have the right to recognition everywhere as a person before the law, is paralleled in some respects by article 14 (3) of the Third Geneva Convention and article 80 of the Fourth Geneva Convention. The provisions of article 18 of the Political Covenant, providing for freedom of thought, conscience and religion, are paralleled in some respects by important articles of the Third and Fourth Geneva Conventions, and of the two Additional Protocols. Although the prohibition of coercion impairing a person's freedom to have or to adopt a religion or belief of his choice has no specific counterpart in the Conventions or the Protocols, it may be derived from other humanitarian provisions.

Turning to parallelism of norms in non-international armed conflict, a brief comparison of common article 3 of the Geneva Conventions with the non-derogable provisions of the Political Covenant is useful for an understanding of the interaction between these two systems of norms. Several of the human rights protected by article 3 are also among the non-derogable rights protected by the Political Covenant. Among these are non-discrimination (article 4 (1) of the Political Covenant); the right to life (protected by article 6 of the Political Covenant and—in different terms—by common article 3 (1) (*a*) and 3 (1) (*d*); and prohibition of torture, etc., stated in article 7 of the Political Covenant.

Some non-derogable rights under the Political Covenant are not stated in common article 3. These include prohibition of slavery, slave trade and servitude under article 8, prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation under article 11, and the principle of non-retroactivity of criminal law declared in article 15. The right to recognition everywhere as a person before the law, stated in article 16, and the protection of freedom of thought, conscience and religion, stated in article 18, are also not mentioned in common article 3. On the other hand, it should be noted that article 3 grants certain rights not explicitly stated in the Political Covenant, or stated therein but as derogable rights only. These include the prohibition of taking of hostages and the critically important due process protection: the prohibition of passing sentences without previous judgement pronounced by a regularly constituted court affording all the indispensable judicial guarantees. In the Political Covenant, this prohibition is only matched by derogable provisions. Importantly, however, the prohibition of passing of death sentences and the carrying out of executions in the circumstances stated in common article 3 (1) (*d*) is partly reflected in non-derogable provisions of the Political Covenant. In addition, common article 3 sets forth the duty to collect and care for the wounded and the sick and allows international humanitarian bodies such as the International Committee of the Red Cross (ICRC) to offer their services to the parties to the conflict.

The human rights stated in common article 3 have been reinforced in significant respects by the provisions of Protocol II. Article 4 of Protocol II enumerates certain "fundamental guarantees" for persons who do not take or who have ceased to take part in hostilities. Article 5 grants important protection to persons whose liberty has been restricted. Article 6 governs penal prosecutions. Part IV extends the protection of the civilian populations. Several of these rights fall into the category of derogable rights under the Political Covenant, but, obviously, cannot be derogated from under the Protocol.

VI. Constructive Convergence and Implementation

Although humanitarian law originates in armed conflicts between States and has historically focused on the development of international protection for victims of international violence, it has recently become increasingly implicated in the regulation of intra-State behaviour in situations of violence. Human rights, on the other hand, originated in the intra-State tension between the Government and the governed. Nevertheless, human rights law, and especially its non-derogable component, is also concerned with protecting certain basic human rights in situations of international and internal armed conflict and in other situations of violence. This significant overlap of humanitarian law and human rights law highlights their growing convergence. In certain situations, humanitarian norms and human rights combine to enhance the protection of the human person.

The observance of human rights is increasingly subjected to scrutiny and monitoring under developing procedures established under human rights instruments adopted in the United Nations, specialized agencies and regional organizations. Useful extra-conventional procedures have been established by resolutions of the United Nations under authority flowing from the Charter of the United Nations (e.g. thematic and country special rapporteurs and working groups).

International humanitarian law, and especially the Geneva Conventions and Protocols, contains significant provisions pertaining to implementation and supervision, such as those governing the institution of protecting powers, the ICRC and other humanitarian organizations, personal criminal responsibility of persons committing grave breaches, the duty of States to bring before its courts or to extradite to another State party persons alleged to have committed or to have ordered to be committed grave breaches, and the principle of liability of States in breach of humanitarian law instruments for the payment of compensation for violations. In practice, however, most of these provisions have not been implemented despite the salutary efforts of the ICRC to assure observance of humanitarian law.

Nevertheless, the convergence between humanitarian and human rights law is progressing rapidly. Although these systems of protection continue to have different institutional "umbrellas" (for the humanitarian law: the ICRC and the Red Cross movement; for human rights: the United Nations and various specialized and regional organizations), a strict separation between the two would be artificial and would only hinder efforts to maximize the effective protection of the human person. In fact, the United Nations has been working to enhance the protection of human rights by relying on norms of humanitarian law (in addition to human rights) in Territories under Israeli Occupation, Afghanistan, Sri Lanka, El Salvador, the Islamic Republic of Iran, Iraq and Kuwait and other areas of conflict.

VII. Material applicability and derogations

It may be recalled that humanitarian instruments, having been enacted to govern situations of armed conflict, are not subject to derogations. Human rights instruments, in contrast, are generally subject to derogations in various exceptional situations, in accordance with the conditions stated in their "derogation clauses". The non-derogable provisions enumerated in human rights instruments, however, cannot be suspended even in time of public emergency which threatens the life of the nation, including international and internal armed conflicts.

The principal difficulty regarding the application of international humanitarian instruments has been the refusal of States to apply them in situations in which their application is required. Attempts to justify such refusals often cite alleged differences between the conflicts presently encountered and those for which the humanitarian instruments were supposedly adopted. As long as States continue to evade the applicability of humanitarian norms, justifying their evasions by the specific circumstances of particular situations, the principle that no derogations may be legally made provides little solace.

The complexity of various conflicts, the difficulty involved in the characterization of the conflict (e.g. as international armed conflict, internationalized internal conflict, internal conflict of an armed character, internal strife accompanied by violence, or internal tensions not accompanied by violence) and the dependence of the applicability of certain norms on the conflict's characterization facilitate denials of the applicability of humanitarian law. Unfortunately, no agreed-upon international machinery exists for characterizing conflicts. The policy of the ICRC is to try to avoid issuing statements on characterization of conflicts. This policy is rooted in its desire to avoid controversies on legal matters, in its perceived lack of competence to make binding determinations of a particular conflict's character, and in its concentration on continued access to the victims.

The broad margin of appreciation or discretion States possess to determine what constitutes a public emergency threatening the life of the nation for the purposes of article 4 of the Political Covenant echoes, in this respect, the absence in humanitarian law of an organ competent to make binding determinations of the character of conflicts.

A. INTERNATIONAL ARMED CONFLICTS

Under common article 2, the Conventions apply to all cases of declared war or any other armed conflict that may arise between two or more of the contracting parties, even if the state of war is not recognized by one of them. The Conventions apply also to all cases of partial or total occupation of the territory of a contracting party, even if such occupation meets no armed resistance. Article 1 (4) of Protocol I expands the above definition of international armed conflict.

B. NON-INTERNATIONAL ARMED CONFLICTS

Common article 3 contains a number of essential protections governing the conduct of contesting parties in non-international armed conflicts. Protocol II has expanded and improved the content of human rights applicable under the provisions of common article 3 in armed conflicts not of an international character, but raised the threshold of applicability to an exceedingly high level.

For political reasons, States are reluctant to admit that the strife which is occurring within their territory has reached the proportions of armed conflict or civil war even in cases of protracted, widespread, and bloody hostilities. The often complex character of many conflicts contributes to this political sensitivity. Given the frequency and cruelty of non-international armed conflicts, it would have been far better if the normative progress made by Protocol II had been accompanied by the lower threshold of applicability of common article 3, but this was not politically feasible. The frequent refusal by Governments to acknowledge even the applicability of common article 3 demonstrates this difficulty.

C. INTERNAL STRIFE

In cases of internal or "mixed" armed conflicts, the principal difficulties lie not only in the deficiency of protective norms but in the lack of respect for the existing law. Nevertheless, improved implementation alone will not provide an adequate substitute for the scarcity of certain norms, particularly non-derogable norms which are essential for the protection of human lives and human dignity in situations of internal violence. In situations of international strife, even law-abiding States may, and in fact do, argue that a particular situation of strife justifies derogations from human rights instruments on grounds of national emergency. Since the strife will typically be below the threshold of violence required for the applicability of common article 3 or of Protocol II, humanitarian law may not be applicable in most situations of internal strife and only the non-derogable human rights provisions remain applicable.

1. *The Need for a New Declaration*

In my previous writings I have attempted to demonstrate the urgent need to draft a declaration containing an irreducible and non-derogable core of human rights and humanitarian norms that must be applied in situations of internal strife and violence. Such normative progress should accompany efforts to strengthen the implementation of extant human rights and humanitarian norms. Internal strife, characterized by substantial violations of human dignity, is now among the greatest concerns of the human rights community.

A United Nations declaration on this subject, rather than a formally binding instrument, would stand a much better chance of adoption. Public opinion, Governments and international governmental and non-governmental organizations would encourage respect for the defined minimum standards of conduct. Hopefully, it would affect the practice of Governments and other actors involved in situations of internal strife and violence and shape rules of customary international law. It is often assumed that customary law develops spontaneously. However, its advancement can be accelerated, directed and shaped through deliberate actions, such as the adoption of normative declarations. A declaration on internal strife and violence would provide a clear focal point for moral pressure to respect humanitarian rules.

Basing protection of human dignity in internal strife only on customary law presents several difficulties. Because of the scarcity of the required State practice, it is hard to persuade the actors involved in situations of internal strife and violence about the content and the binding character of unwritten rules.

A new declaration could attempt to address one of the difficulties with regard to the usefulness, in situations of internal strife, of such human rights instruments as the Political Covenant, i.e. that the obligations which it states are addressed primarily to Governments (vertical applicability). Unless some obligations are addressed also to the groups fighting the Governments, and to the groups which are fighting each other (horizontal applicability), Governments are unlikely to accept and to respect a declaration setting out humanitarian standards on internal strife. The prospects for humanizing internal strife are greatly improved if the obligation to abide by essential humanitarian principles is addressed to the opposition as well as to the Government in such a way that the duties are reasonably balanced and the norms of behaviour are not unduly favourable to either side.

2. *Contents of the Proposed Declaration*

Of course some, indeed many, norms such as the prohibition of murder, disappearances, torture, and hostage taking can be regarded as applicable in all situations, including situations of internal strife and violence, and are not susceptible to derogations. But the Political Covenant and other human rights instruments simply do not state certain essential rules necessary to protect human rights in situations of violence, such as those relating to means and methods of combat. Given the limitations of space, I shall mention only a few of the norms that are needed in situations of internal strife.

(*a*) Experience indicates that *widespread abuse of judicial guarantees* is common in situations of internal strife. The important guarantees of due process are mostly derogable in human rights instruments (e.g. articles 9 and 14 of the Political Covenant). These guarantees also appear in humanitarian instruments and are thereby non-derogable. However, respect of non-derogable human rights is frequently circumvented through suspension of judicial guarantees. It is essential, therefore, that the new declaration prohibits derogation of certain essential judicial guarantees.

(*b*) *Abusive and excessive force* is frequently used against civilians and innocent bystanders in situations of internal strife, e.g. to suppress demonstrations, to enforce curfews or to intimidate the population. The problem is exacerbated by the absence in human rights instruments of provisions aimed at humanizing violent conflict situations, such as requiring ''proportionality'' between a legitimate objective and the amount of force used to achieve that objective. Most importantly, rules are needed pertaining to the regulation of the use of means and methods of combat in situations of internal violence. Only few provisions concerning permissible use of force can be found in international humanitarian instruments governing internal armed conflicts. To attempt to remedy this situation, the International Institute of Humanitarian Law (San Remo Institute) elaborated at its 1989 session rules governing the conduct of hostilities in such conflicts.

While it is possible to maintain that certain general principles of customary law should govern the use of force even in situations of internal strife and violence, efforts to humanize behaviour by invoking general principles of customary law have not proven particularly successful. Appropriate provisions must, therefore, be included in a declaration on internal violence. Such provisions can build on the Basic Principles on the Use of Force and Firearms by Law-Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990).

(*c*) *Deportations and forced movements of the population* which cause great suffering and often lead to the loss of life are common in situations in internal strife. Articles 12 and 13 of the Political Covenant addressing the liberty of movement and the expulsion of aliens are derogable and subject to limitation clauses. These articles do not explicitly address, though they clearly implicate, the phenomenon of mass expulsions, but the major regional human rights instruments do expressly prohibit mass expulsions of aliens. Although the General Comments of the Human Rights Committee on article 13 are beneficial in fighting deportation abuses, it is important that the declaration should address these phenomena explicitly for situations of internal violence following the model of the provisions contained in humanitarian law instruments.

(*d*) Among the phenomena endemic to internal strife, massive and prolonged *administrative detentions* merit special consideration because of their frequency and the Political Covenant's lack of non-derogable provisions guaranteeing judicial review.

A provision addressing the phenomenon of massive and prolonged detentions (often ostensibly for preventive purposes) would, therefore, be of great importance. Such a provision should contain minimum standards of treatment, the right to correspond with families and the right to family visits. Minimally, ordering the preventive detention of an individual should be subject to at least some due process guarantees such as the right to appeal and a periodic review.

VIII. Concluding observations

Humanitarian law and human rights law work in tandem to enhance the protection of the human person in all situations. Nevertheless, serious gaps or lacunae still remain in the area of internal violence, where humanitarian law meshes with human rights law. The proliferation of situations of internal violence and human suffering that it entails, together with the present improvement in the climate of international relations, suggest the time has come for the United Nations to adopt a normative declaration containing the necessary norms for the protection of human rights in such situations.

An important start has already been made. As a follow-up to a conference convened in Oslo by the Norwegian Institute of Human Rights and the resulting Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence (1987), the Institute for Human Rights of the Åbo Akademi University (Turku/Åbo, Finland) organized (1990) an International Symposium on Minimum International Standards which approved the text of a Declaration of Minimum Humanitarian Standards.

The focus of this Declaration shifted from exclusive applicability to internal strife to applicability in all situations, including internal violence. This Declaration would constitute a safety net of minimum humanitarian norms and an irreducible core of human rights that must be applied at all times. It merits adoption by the United Nations.

Human rights law and international humanitarian law: two coins or two sides of the same coin?

*Françoise J. Hampson**

Introduction

Civil disorder, of whatever scale or proportion, does not spring from nowhere. It is almost always preceded by a period of perceived inequality and injustice which has been marked by increasing political tension and unrest. Sporadic disorder becomes organized violence and, all too often, degenerates into a total lack of restraint on the part of the fighters. Torture, arbitrary killings and massacres of civilians become commonplace. In terms of human rights law, those rights which are to be *promoted*, principally economic and social rights, are forced into the background as the State diverts resources to the maintenance of law and order. Increasing disorder commonly leads to repressive measures on the part of the Government, which compounds the original problem. That period is marked by varying degrees of violation of rights which are to be *protected*, principally civil and political rights. As the situation deteriorates, those rights from which no derogation is permitted, even in time of armed conflict, are increasingly violated. Respect even for those rules specifically designed for conflict situations, sometimes called international humanitarian law, is haphazard.

This pattern, with all the inadequacies which accompany such generalizations, is nevertheless one which has been repeated all too often and demonstrates the need *both* to prevent such situations arising and to impose effective restraints at whatever stage of the downward spiral has been reached, in order to prevent a further deterioration of the situation.

There is, therefore, not inconsistency in pursuing the long-term vision of positive peace, in which justice, health and education for all are promoted in an environmentally sustainable way, whilst insisting on immediate respect for the physical and moral integrity of individuals and on the responsibility of those employing force for the manner of its exercise. The pursuit of any one of these objectives is reinforced by the pursuit of the others.

---

* Lecturer in Law, University of Essex.

In other words, those organizations, both IGOs and NGOs, active in the promotion of human rights should not see themselves as competitors but as natural allies of the International Committee of the Red Cross, the organization principally responsible for ensuring respect for humanitarian law.

Developments in human rights law and international humanitarian law

International human rights treaty texts expressly provide that, in time of public emergency, the application of certain rights may be modified to the extent strictly required by the situation. They then stipulate that certain rights cannot be derogated from in any situation. The United Nations took the next step in recognizing that rules were applicable, even in armed conflicts, when the General Assembly adopted resolution 2444 (XXIII), entitled "Respect for human rights in armed conflicts", following resolution XXIII of the International Conference on Human Rights held at Teheran in 1968. This represented a significant development for the United Nations, since the organization was recognizing the need to regulate armed conflicts.

In the meantime, the International Committee of the Red Cross had been seeking ways in which it could improve the protection of the civilian population against the effects of war. At the XXth International Conference of the Red Cross, held at Vienna in 1965, resolution XXVIII was adopted enumerating fundamental principles of the law of war. Government delegations are an important component of the International Conference of the Red Cross. Thus we see that, by 1968, Governments had accepted a link between human rights and humanitarian law. Furthermore, they had recognized that humanitarian law included not only the law on the protection of the victims of war (traditionally called the Law of Geneva) but also the rules on the conduct of military operations (traditionally called the Law of The Hague). This found its fullest expression in two Protocols adopted in 1977, which updated the four Geneva Conventions of 1949 and certain aspects of the Hague Conventions of 1907 on the means and methods of warfare.

This confluence of various legal streams was reinforced with the adoption in 1980, by the special United Nations conference, of the Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, with three annexed protocols. That treaty provides a bridge between the traditional law of armed conflicts, which prohibits weapons which cause unnecessary suffering and superfluous injury, and disarmament treaties which were previously seen as distinct, not only from human rights law but even from the law of armed conflicts. However tentatively, some link has been established. Where discrete bodies of law are seen to be dealing with a similar problem, albeit from a different perspective, it becomes important to ensure that their substantive content does not conflict. It also raises the question of whether there is anything to be gained from having different streams of law or whether they can all be subsumed in human rights law. These will be examined in turn.

Overlapping or conflicting content?

International human rights treaty texts adopt as their starting point the inherent rights of individuals and of certain types of groups. This leads to limits on the freedom of executive and legislative action on the part of States, where the effect of such action would be to violate protected rights. The treaties also stipulate policy objectives for States, such as the promotion of education, health care and welfare benefits. The obligations are directed to all State agencies and not merely those responsible for the use of force. In other words, members of the police or of the armed forces are not singled out in any way. In time of public emergency, the prohibitions of arbitrary killing and of torture or other cruel, inhuman or degrading treatment or punishment are of increased concern because they are more likely to be violated than at other times. Equally, it is in the nature of things that the role of those using force at the behest of a State assumes greater prominence. The classification of such State agents, whether as police, paramilitary police or armed forces, is irrelevant; it is certain actions that are prohibited, on account of the rights of the potential victim. The starting point of human rights law is the right of the individual, including the right not to be arbitrarily killed.

The international law of armed conflicts, which is very much older in its origins than human rights law, starts from totally different premises. The soldier has the right to kill another soldier. There are, however, certain limits on what armed forces can do. They can, for example, only lawfully target military objectives. This means that they cannot intentionally target civilians, the civilian population or civilian property. Furthermore, they must use weapons and means of attack that are not indiscriminate. Whilst some civilian casualties may be inevitable, this is not an excuse for disregarding the presence of civilians near a military objective. Finally, the means they can adopt for injuring even the armed forces of the enemy are not unlimited.

In the case of those not taking an active part in the hostilities, such as the wounded, sick and shipwrecked, prisoners of war and civilians living under belligerent occupation, the obligations are extensive and detailed. There is a positive duty to protect and care for such " protected persons".

These rules are not based on any notion of the "right" of the individual civilian not to be attacked, the "right" of the prisoner of war to good treatment or the "right" of the injured to medical care. The Conventions are based rather on the reciprocal *obligations* of States. This is given effect by imposing obligations on members of armed forces, for the breach of which international law requires that they be punished. The State itself is also responsible for the conduct of its armed forces.

Philosophically, human rights law and humanitarian law start from very different premises. The rules are designed to fulfil different functions, human rights law being applicable to varying degrees in all situations and humanitarian law only in time of armed conflict. The rules also concern different actors. By way of illustration, it is helpful to think of a pebble hitting a pond. In the case of human rights law, the pebble is the individual whose rights are to be protected. The ripples encompass many different State agents, depending on the situation. In the case of humanitarian law, the pebble is the member of the armed forces, rather than a potential victim. The ripples are the different categories of people with whom he/she has to deal. In the first case, it is the State agents (the ripples) who are limited in the actions they can take. In the latter, it is the member of the armed forces (the pebble) who is restricted.

Whilst the *form* of the rules is therefore very different, nevertheless the *effect* of the two bodies of rules is strikingly similar. A specific example will illustrate this. In article 6 of the International Covenant on Civil and Political Rights, there is a prohibition of arbitrary killings. In the European Convention on Human Rights, the treaty defines the only purposes for which lethal force may be used and requires that it be "no more than absolutely necessary". The human rights texts therefore prohibit indiscriminate killings, disproportionate attacks and the use of weapons which are either inherently indiscriminate or which cause disproportionate or indiscriminate casualties amongst bystanders. International humanitarian law prohibits all attacks against "protected persons". Further, an attack against a lawful target will be unlawful if it uses an unlawful weapon or if the attack is likely to cause disproportionate casualties among civilians. Whatever the *form* of the prohibitions, it would appear that any killing which is in breach of international humanitarian law is also in breach of non-derogable provisions in international human rights texts.

This confirms the impression created by the confluence of the three streams of law and strongly suggests that, in some meaningful sense, we are dealing with *one* field of law. Can the Law of The Hague on the conduct of hostilities and the Law of Geneva on the protection of war victims not simply be merged into human rights law or are there advantages in retaining their separate identities?

Fusion or separate identities?

A purely pragmatic answer might be to retain what has already been established, rather than run the risk of calling into question hitherto undisputed or tolerated provisions.

There are also, however, strong reasons for retaining the separate and distinct bodies of rules. The rules are designed to meet different needs. Humanitarian law is specifically applicable in armed conflicts. This has enabled the development of very detailed obligations, particularly in the case of the Geneva Conventions and inter-State conflicts. The two streams have different starting points and address different actors.

Above all, human rights law and humanitarian law have major weaknesses which are sometimes compensated for in the other domain.

GAPS AND DEFICIENCIES

There are four major weaknesses in the substantive content of humanitarian law. The first is the least important in terms of human rights law. There is considerable uncertainty as to what are and are not lawful targets in naval warfare. That is currently the subject of discussion. The remaining three gaps are interconnected and have a very considerable impact on the protection of individuals from arbitrary killing.

First, there is no independent and automatic system for classifying conflicts as international or non-international, where a second State assists the Government of the first State in whose territory an "internal" armed conflict is taking place. Examples of the problem of classification include the conflicts in Viet Nam, Afghanistan, Lebanon and Cambodia. International law regulates in considerable detail conflicts characterized as international but only the most rudimentary framework exists in the case of non-international conflicts. This is attributable to political factors such as the unwillingness of States to recognize "rebels" as anything other than armed criminals. Nevertheless, since the Second World War, more innocent civilians have been killed in these situations than in international armed conflicts. Certain struggles in the name of self-determination are treated as international under Protocol I to the Geneva Conventions, even though occurring within the territory of one State and without external participation.

Secondly, international humanitarian law not only classifies conflicts but ascribes a different status to various categories of individual. "Privileged combatants" have the right to take part in hostilities and to prisoner-of-war treatment upon capture. Civilians are entitled to protection for so long as they do not take part in hostilities. In other words, individual human beings have no significance as such. What matters is the group to which they belong. Human rights law avoids these difficulties by taking the individual as its starting point. His status does not matter and neither does the classification of the conflict as international or internal.

Thirdly, in non-international armed conflicts there are few restrictions on the conduct of hostilities and no recognition of the rights of those taking part in the fighting. In particular, it has proved extremely difficult to ensure the proper treatment of captured "rebels" and to ensure that they themselves respect their obligations. Human rights law is of only limited assistance. If respected, the prohibitions of arbitrary killings and of torture would have the effect of limiting the conduct of hostilities and of providing rudimentary protection for participants. The provisions on detention and due process are, however, to varying degrees, derogable rights. That is to say that their application may be modified in time of public emergency. The death penalty is still imposed in many countries for activities such as the taking up of arms against the Government. The imposition of obligations on "rebel" groups also itself creates both theoretical and practical difficulties in human rights law. They are scarcely less problematical in international humanitarian law.

There are, then, gaps or deficiencies in humanitarian law, some of which can be alleviated by the application of human rights law. The converse is also true. Where international humanitarian law is at its most specific, which also in practice often means most respected, it offers much better protection to the potential victim than does human rights law. The obligations of the detaining Power *vis-à-vis* a prisoner of war, for example, should result in better treatment than that available to detainees under human rights law.

The two bodies of rules therefore complement each other. Much would be lost in only seeking the development of one at the expense of the other. The co-existence of the two legal streams does, however, give rise to a problem of perception which needs to be addressed.

Problems of perception

Members of armed forces often give the impression of being defensive when talking to human rights lawyers. It is as though the former either see themselves as the "bad guys" or think that their interlocutors see them in that way. Human rights lawyers, particularly members of some NGOs, are perhaps equally prone to take a stand on individual rights, rather than to seek to build bridges. As shown earlier, the two bodies of rules appear to prohibit similar conduct but in different language and using different concepts. It is a matter of learning another language in order to express the same principle. In the author's experience, members of armed forces *are* open to genuine discussion when it takes place using concepts with which they are familiar.

Human rights activists have sometimes shown themselves to be less willing to engage in real discussion. The task in convincing those who use armed force of the importance of respect for the rules is so urgent that learning to speak their language is a small price to pay to achieve an objective important to the protection of human rights. This is an element in the enforcement of the rules. Human rights law and humanitarian law have a different emphasis in the techniques used to secure compliance with the rules.

Enforcement

Whilst there is provision for independent fact-finding in humanitarian law, it relies principally for its enforcement on the internal military and/or criminal law of States. An obligation is imposed on States to seek out and try those alleged to have perpetrated "grave breaches" of the Geneva Conventions. The trial will take place under municipal law. The Nuremberg and Tokyo International Military Tribunals were exceptional. An effective mechanism for the prevention of violations, in the case of prisoners of war at least, is the deterrent effect of visits by delegates of the International Committee of the Red Cross (ICRC). There is, however, no obligation to report to an independent body which will publish its findings. There is no provision for a right of petition to an independent international body.

In the case of human rights law, the obligation to report on implementation is now commonplace, even if the record of States in actually submitting their reports is disappointing, and a right of individual petition is provided for increasingly frequently. Considerable use is made of NGO reports, which are publicized as much as possible.

These two systems of enforcement are designed to meet the different needs of the two bodies of law. Nevertheless, they again complement each other in a potentially useful way. Where the quiet diplomacy of the ICRC is achieving little, the weight of NGO publicity can be brought to bear on a situation. The case-law of the human rights bodies, in their examination of periodic reports, inter-State cases and individual cases, demonstrates how what are, in effect, violations of humanitarian law can be brought within the terms of human rights law.

These enforcement systems are effective, if at all, after the event. There is an urgent need, in both human rights law and humanitarian law, to work for the prevention of violations.

PREVENTION

This calls for much more than teaching and instruction—but more of that would be a good start. It may be worse than useless to inform officials of rules which they know the State has no intention of respecting. Such an attitude may foster an attitude of disregard or even contempt for the rule of law. In other words, for dissemination to be effective, those being instructed must believe that the State takes compliance with legal rules seriously and that violations will be punished with appropriate severity. It is better still for an official not only to learn the rule as a matter of legal obligation but for him/her to be convinced of its moral rightness. Individuals are more likely to refrain from taking certain prohibited action where they believe such conduct to be wrong than where they merely believe it to be against the rules. Where State officials are encouraged to base their conduct on what is morally right, they may be more inclined to fill in the gaps in the protection offered by human rights law and humanitarian law in a humane way. As already seen, one of those gaps is the very limited regulation of non-international armed conflicts. The application of basic human decency would make a great difference. Such a plea is not merely a pious aspiration. It makes *military* and *political* sense. A stable peace requires the consent of the governed. The Government loses the right and the expectation of the support of the people where it engages in arbitrary killings, massacres of civilians and indiscriminate attacks.

Filling in the gaps: a need for additional norms?

If there are gaps or deficiencies in the legal provisions, this suggests that there is a need for additional or more specific norms of human rights and humanitarian law. It should be emphasized that *some* rules are always applicable, either non-derogable human rights law alone or in conjunction with certain provisions of the Geneva Conventions of 1949. The larger part of the responsibility for massacres is attributable to the lack of respect for *existing* rules. Nevertheless, it would be helpful if the list of non-derogable human rights were expanded, if express and more specific limits were set on the conduct of hostilities in non-international conflicts and if the threshold at which States could derogate from their human rights commitments were expressly pitched as the same level as the minimum threshold for the applicability of common article 3 of the Geneva Conventions. This needs to be the *effect* of any new provisions. Their form—a development of humanitarian law or human rights law or an autonomous text—is less important. Agreement on the provisions is what matters most.

Such a text needs to avoid classification and characterization of fighting and any use of thresholds of disturbance. This is not inconsistent with putting the human rights derogation threshold in the same place as that applicable in the field of humanitarian law. The text must apply to all participants and potential victims. It needs to ensure that all captured fighters have certain minimum rights and to provide greater specificity regarding the content of existing norms on the treatment of every individual, whether or not he/she has taken part in the fighting.

Such texts have been proposed by individuals and groups, including Theodor Meron's *Draft Model Declaration on Internal Strife*, the Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence and a Declaration on Minimum Humanitarian Standards, adopted by a meeting of experts convened in Turku/Åbo in Finland in December 1990.

Conclusion

It was seen at the outset that a breakdown in civil peace tends to lead to accelerating disorder, with serious adverse effects on every type of human right. The majority of countries in Africa facing famine have suffered from or are currently experiencing serious levels of disorder. Drought is not the only plague affecting parts of the continent. Once civil disorder starts, it is hard to contain. This is only exacerbated by the tendency of Governments not to tackle the cause of the problem but to seek merely to contain the situation. This leads to other human rights problems, in addition to the original ones. Once atrocities start to occur, whoever is responsible for them, fear, hopelessness and the desire for revenge remove any remaining inhibitions and produce the disintegration of any sense of community or society. A recent example of such a tragedy is to be found in Liberia. Different rules are needed to meet various elements in the situation and changes in the situation. The promotion of human rights is as important as their protection and the imposition of effective restrictions on those using armed force. These rules need to be seen as complementary rather than in competition. Both the independence and the interdependence of human rights law and humanitarian law need to be recognized. The strengths of the one can help to counteract the weaknesses of the other. The one element linking all such norms is the need to convince every human being of the importance of respect for the rules. Respect for the principles is *not* an expensive luxury. It makes political and military sense. A lack of such respect leads to the instability of oppression, not a genuine peace. Convincing Governments, fighters and the governed requires dissemination not only of the principles themselves but of the moral values underpinning them. What is at stake is more than the rule of law; it is life itself.

Human rights and international humanitarian law

*Cornelio Sommaruga**

More than ever before, the importance of these two branches of international law, international humanitarian law (IHL) and human rights, has become apparent, pinpointed by the huge challenges which mankind as a whole has to tackle. In the face of increasingly acute suffering, voices have been raised in all parts of the world against repeated violations of standards designed to protect human beings in peacetime and in time of armed conflict. It is clear that the rules which offer protection constantly require protection themselves. They are but a means to an end—the protection of human beings under all circumstances—but the final objective will never be attained if the means are ineffective. Both are driven by a common necessity: to afford human beings maximum protection. In order to grasp this calling, there is a need for a brief recapitulation of the development of the norms specific to each of the two systems, with particular emphasis on the minimum rules to be observed at all times, before turning to the machinery for implementing them.

I. The evolution of human rights and IHL

From the outset, let us avoid speaking of the unity or duality of these specific spheres of international law, and focus rather on a number of their characteristic features.

1. Since man developed a sense of his identity, the dignity of human beings has had its place in the consciousness of each of us. This is clearly affirmed by the major religions and philosophies, which set man at the centre of the world.

The charters that enshrine certain "human rights" were initially national in character. The 1789 French Declaration of the Rights of Man and of the Citizen was the culmination of the whole of the philosophy of the Enlightenment. It reflects a rejection or questioning of the established order, which disregarded fundamental human rights. This domestic origin of human rights may also be found in the basic laws of various States, in the recognition of citizens' "public freedoms" or "fundamental rights", whose exercise is governed by law or regulation.

---

* Secretary-General of the International Committee of the Red Cross.

Without disregarding the significance of a number of international texts, such as the 1926 slavery convention and the 1930 forced labour convention, the greatest strides in the field of human rights, at the universal level, were made during the two decades from 1948 to 1968.

The Universal Declaration of Human Rights, which was adopted in 1948 by the United Nations General Assembly, following the horrors of the Second World War, asserts the fundamental rights of the person at the individual, collective, family and social levels. Their achievement is a matter for "all peoples and nations" (preamble). The principles of the Declaration were to be taken up in the two United Nations covenants adopted in 1966, the first of which concerns "economic, social and cultural rights" and the second "civil and political rights", and by an optional protocol to the second covenant. These instruments were adopted at the height of the process of decolonization and came into force in 1976. They bind States parties to a set of commitments, from the most important of which no derogation is admitted. Thus, pursuant to the International Covenant on Civil and Political Rights, no derogation may be admitted from the prohibitions against threatening the life of an individual, holding him in slavery or servitude, imprisoning him for debt, retroactively applying a criminal law, refusing the right to recognition as a person before the law, or failing to respect freedom of thought, conscience and religion.

Human rights have continued their progress within the framework of the United Nations through the adoption of new instruments (the struggle against *apartheid*, the rights of women, the rights of children, the struggle against torture, etc.). Many specialized agencies also contribute to the development of human rights in various spheres (labour, culture, education, health, etc.).

The universal nature of these rights does not prevent them from being set forth on a regional basis, as in the case of the European and American conventions and the African Charter, which is notable for encompassing human and peoples' rights.

The instruments cited above cover man's exercise of his rights under "normal" circumstances, i.e. in peacetime. However, we have seen that no derogation is possible from certain fundamental rules whatever the circumstances, even in times of armed conflict; this has been recalled by the United Nations on many occasions. As an illustration, resolution 2675 (XXV) of 9 December 1970 asserts that "fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict". "Elementary considerations of humanity" must prevail among nations, as was decreed by the International Court of Justice in the *Corfu Channel* case (1949). Such assertions are essential, not only as regards international humanitarian law, but also in respect of the applicability of human rights in times of armed conflict.

2. International humanitarian law is designed to protect non-combatants or persons placed *hors de combat*, as well as civilian property. Numerous rules bearing on the conduct of hostilities and the treatment of non-combatants are deeply rooted in the heritage of nations. However, the systematic spread of IHL sprang from the action undertaken on the battlefield itself to help the wounded and sick. The starting-point is simple: humanitarian feeling and unyielding faith in the value of human dignity. Thus, it is not by chance that humanity is first among the seven fundamental principles of the International Red Cross and Red Crescent Movement.

It has often been said of IHL that it is always "one war behind". This is not the whole truth, since on the one hand, the principles are immutable, and on the other, each instrument necessarily reflects the preoccupations of those who promoted or adopted it on the basis of the lessons of the past, although their objective was prevention and the implementation of the text in the future. Ameliorating the fate of the victims of armed conflict is the foundation for the action of the advocates of IHL. Is there any need to recall that humanitarian action has to be performed without any discrimination, as stipulated by the principles of the Movement and all the applicable rules?

The four Geneva conventions of 1949 and the two additional protocols of 1977, which constitute the essence of IHL, are no less than the juridical expression of a common determination to extend rights and guarantees to several categories of individuals in time of war. From the protection of "the wounded of armies in the field" (1864 Convention), IHL has extended over the years to the protection of the sick, the shipwrecked, prisoners of war and civilian persons. It applies both to international conflicts and to conflicts not of an international character. We shall see that in situations of violence that are not covered by IHL, the International Committee of the Red Cross (ICRC) is also able to offer its humanitarian services. In whose name? In the name of the principle of humanity. This same principle implies that war must not serve as an outlet for anger nor as a justification for any form of inhuman treatment. On this point, as on many others, human rights and IHL are in harmony.

II. Minimum rules to be observed under all circumstances

The participants in the 1949 Diplomatic Conference which adopted the four Geneva conventions did not only have fresh in their minds the pathetic scenes of the Second World War and the serious violations committed by the warring parties, but also the violations of the most elementary principles of humanity and ethics committed in the Spanish Civil War, a domestic conflict.

Article 3, relating to conflicts not of an international character, which is common to the four conventions, prohibits "at any time and in any place whatsoever . . . ":

> (*a*) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (*b*) Taking of hostages;
>
> (*c*) Outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (*d*) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

These are "minimum rules" applicable to all conflicts, as was affirmed by ICJ in the case concerning military and paramilitary activities in and against Nicaragua (1986).

The same article recognizes the right of ICRC to "offer its services to the Parties to the conflict." The conflicts of the second half of the twentieth century have demonstrated the need for and the role of these provisions. The "right of initiative" granted to ICRC by States is a considerable achievement, especially as there is no need to demonstrate the sensitivity of States in that sphere. Like article 3, common to the Geneva conventions, article 4 of the International Covenant on Civil and Political Rights prohibits derogations from the rights and freedoms described above. Article 4 of the Covenant is comparable to the régime established by the Fourth Geneva Convention for protected persons (in particular arts. 27 to 34).

This "hard core" around which the fundamental guarantees have formed has been supplemented by Protocol II of 1977, additional to the Geneva conventions of 1949, relating to the protection of victims of non-international armed conflicts, whose preamble refers directly to human rights. For its part, Protocol I (on international conflicts) establishes a régime of minimum guarantees for persons who do not benefit from more favourable treatment under the conventions or the Protocol. Physical integrity, honour and legal rights are thus reinforced by the new provisions of article 75 of Protocol I. Thus, it is clear that "Geneva law", designed to protect persons in the hands of the enemy, was not unaffected by the renewed momentum of human rights, reflected in the 1966 covenants. The role of this "safety valve" in protecting the rights of the person is fundamental, all the more so since virtually all States are parties to the Geneva conventions and the number of ratifications of the two additional protocols is constantly increasing (as of 31 December 1990, 99 States had ratified Protocol I and 89 Protocol II). In recent years, increasing support has been voiced for a "third generation" of human rights whose foundations would be the right of human beings to development, peace and a healthy environment. War has disastrous consequences both for men and nature. While regulations relating to the protection of victims, in the broad sense, are designed to limit the suffering caused by war and to maintain a minimum of humanity, prohibiting or restricting the use of certain types of weapon is also beneficial to man and nature. The desire to preserve the environment from the devastating consequences of war is not a recent one, although regrettably the law is disturbingly behind the times. Fortunately IHL expressly establishes the obligation to protect the natural environment in time of war (Protocol I, art. 55). The protection of objects indispensable to the survival of the civilian population and of works and installations containing dangerous forces (Protocol I, arts. 54 and 56 and Protocol II, arts. 14 and 15) also contributes towards protecting the environment. Peace, environment and development: are these really "new" human rights? Not really, as they are indispensable to man at any time and in any place. Their "newness" thus lies elsewhere, in their sanction by law and the obligations to implement them that stem therefrom.

Concern for human rights cannot be restricted to a specific period or place. ICRC, which ensures the implementation and the development of IHL, is fully aware of this. Alongside other components of the International Red Cross and Red Crescent Movement, it carries out protection and assistance activities of various types, even in the absence of armed conflict. For example, the sole objective—and basis—of visits to "political detainees" in many countries is respect for the minimum rules of humanity.

The systems of human rights and of IHL have established a number of means of attaining their respective objectives.

III. Implementation of the rules for protection

1. International and regional human rights conventions are designed to protect individuals in peacetime. Although they are binding upon States, they apply to problems that may arise between a State and its own citizens. It is important to stress this feature, as it concerns the sphere of State sovereignty. However, in order for these rights, in respect of which a State has made an international commitment, to become effective and meaningful, it has proved necessary to establish a number of formal and organic mechanisms. States or individuals, by way of petition or complaint, may bring their cases before *ad hoc* bodies, or a court (for example, the European Court of Human Rights), requesting investigations, reports and decisions, whose publication may have a greater or lesser preventive or dissuasive effect, but which are in themselves inadequate to pass on the human rights message. In this respect, mass education is essential. The large number of institutions dealing with human rights, either directly or indirectly, have a

duty to publicize those rights, to become involved in the field and to investigate violations on the spot, to report the progress made and to assess what remains to be done. It is true that much remains to be done, not only to promote human rights, but also to respect them and to safeguard the guarantees they afford to human beings.

2. IHL, which was designed to regulate the relations that arise out of armed conflict, would be incomplete without machinery for implementation. While the interests of victims are its ultimate objective, like the rest of international law, it results from consent by States.

Even before applying IHL in a conflict, preventive action in peacetime is necessary. For this reason, making the rules of IHL widely known is both a duty and a means of ensuring familiarity with their content and above all the "minimum standard" that applies under all circumstances. The contracting parties bear a heavy responsibility in this respect, by virtue of the four conventions and the two additional protocols. The obligation to "respect and to ensure respect for" IHL "in all circumstances" (art. 1 common to the four conventions and Protocol I) is binding upon the contracting parties. The new provisions adopted in 1977 stipulate in particular that commanders must ensure that their forces are aware of their obligations under IHL and provide training for qualified personnel "to facilitate the application of the conventions" and of Protocol I, and require the appointment of legal advisers in armed forces.

During a conflict, the belligerents have a duty to comply with the commitments they have entered into, and to compel their armed forces to comply with them.

The institution of the Protecting Powers is provided for by the 1949 conventions and Protocol I. There is no such institution in the case of non-international conflicts, hence the need to remedy that shortcoming by ensuring that observance of the fundamental rights of the victims of such conflicts receives maximum attention.

As the Protecting Power may not be appointed without its consent and that of the belligerents, the conventions and Protocol I make provision for an alternative, the substitutes and ICRC.

As the system of Protecting Powers has hardly been operative during recent conflicts, it has been ICRC which in most cases has assumed actual responsibility for the humanitarian tasks vested in the Protecting Powers.

However, regardless of the legal status under which it intercedes, ICRC always seeks to attain its objective—upholding the interests of victims—with conviction.

War crimes should not go unpunished. The conventions and Protocol I contain a list of "grave breaches" or war crimes which the parties are required to punish in accordance with applicable procedures and with due respect for legal guarantees. The investigative system is also provided for by the Geneva conventions. Protocol I goes further by requiring the establishment of an International Fact-finding Commission (art. 90). This latest innovation of IHL will shortly come into being, as the conditions set by article 90 have now been met (acceptance of the competence of the Commission by 20 contracting parties).

In "non-conventional situations", i.e. violent situations, such as internal disturbance or tension, to which IHL does not apply, ICRC exercises its statutory right of initiative to ensure, in particular, the observance of fundamental individual rights. It is aware of the abuses that may occur in situations of "internal disturbance or tension", and concerns itself with the fate of persons deprived of liberty, and it provides them and their families, where appropriate, with suitable material and medical assistance. Displaced persons may also receive such assistance.

Visits to political detainees provide the delegates of ICRC with an opportunity to help such persons first of all and to seek changes in any treatment or conditions of detention that are unacceptable to ICRC.

This is no time for optimistic or pessimistic assessments. What really counts is the development of a universal awareness of human rights and of IHL. Men do not lose their humanity because of war, a fact that is brought home to us by the "minimum standards" that are to be observed. In this connection, the complementarity of and co-ordination between actions undertaken by humanitarian bodies are indispensable. The status of observer at the United Nations recently extended to ICRC could serve to strengthen its means of action. Safeguarding IHL and human rights under all circumstances must be our common concern, particularly as the upheavals in today's world are far from being isolated cases or restricted to certain countries. In the conflicts taking place in several of the world's regions, populations often have to endure not only the consequences of the fighting, but also the worst violations of the minimum rules of protection acknowledged by ethics and law. That sad fact prohibits us from shirking the noble duty of preventing suffering and helping victims.

II. HUMAN RIGHTS AND REFUGEE LAW

Refugees and human rights

*G. J. L. Coles**

Today, human rights should be recognized as central to the entire refugee issue. As has been affirmed repeatedly by the international community during the last four decades, they express the values and principles which constitute the foundation of freedom, justice and peace in the world. As such they are as centrally relevant to the refugee issue as they are to any other major social issue today.

In the past there was a tendency, at times, to see refugee law as a branch of law quite separate from that of human rights. This was, perhaps, part of a more general tendency during the post-war period to compartmentalize law, breaking it up into different and even autonomous branches, so much so as almost to suggest that there was no *one* law but only a number of different and separate laws. In such a view, with its strong "positivist" approach, refugee law possessed its own special purposes and principles which were determined essentially by its own constituent instruments and which were thus independent of those of human rights law. This view, of course, was an over-simplification, as the human rights instruments not only contained no limitations excluding their application to the refugee situation but, to the contrary, contained provisions which were either explicitly or implicitly applicable to that situation.

Such a separation of refugee law from human rights law was unfortunate, and inevitably it had harmful effects. Basically, it overlooked the fundamental principle that the refugee, like every other category of human being, is ultimately a person possessing, as such, basic rights which are independent of "positive" refugee law for their application. An absolute separation of the two is inconsistent with any principle of the fundamental unity of law in regard to its general purposes and principles; further, it served as a block to the progressive development of refugee law by closing off arbitrarily the application of general principles of law which are properly apt to fill in the lacunae of conventional refugee law. These lacunae inevitably existed by virtue of the fact that the conventional law is necessarily a product of a particular time and place and so becomes, in different or changing circumstances, incomplete, even, finally, obsolescent. Moreover, the separation served to deny refugee law a general purposive context, the absence of which threatened to make that law in different and changing circumstances both unjust and impractical.

---

* The author is a staff member of the Office of the United Nations High Commissioner for Refugees. The views expressed in this paper are those of the author and not necessarily those of the Office.

With the decline of the strict "positivist" approach to law, which has accelerated during the last two decades, the law has been liberated from the stultifying effects of those elements of the past which only served to act as shackles, impeding the law from responding in a just and practical way to new human and social needs. Now, human rights conceived as general principles of law assure the continuing relevance of law to those needs.

It should be said at the outset that, from a universal perspective, traditional (or conventional) refugee law was seriously incomplete, even unbalanced, by reason of the fact that, *inter alia*, it was primarily directed, and thereby limited, to the rights of the individual in relation to the receiving country. Essentially, it was a law for the institutionalization of exile. Excluded entirely from its scope were the rights of the individual in relation to the country of nationality, especially in regard to the basic aspect of freedom of movement. The latter rights were considered as belonging, for example, to human rights law, but were considered *a priori* as not belonging to refugee law. In practice, they were often considered as inapplicable to the refugee situation.

I believe, however, that human rights as general principles of law serve to establish that the complete and balanced approach to the refugee issue must address both sets of rights if it is to be just and practical.

In recent years, the international community's traditional approach, which was essentially the product of the Cold War era, has developed significantly as it has been increasingly realized that, in a changing world, it is both possible and necessary to address the refugee issue *as a whole*, i.e. its causes and the aspect of solution *generally*, including the primordial aspects of prevention and return as well as its principal and limited traditional focus of concern, i.e. the need for external palliative measures.

This development has corresponded to considerations of both justice and practicality.

In this paper, I would like to concentrate mainly on this development, as I believe it is of great significance for the evolution of refugee law as well as for the more effective protection of the individual. By concentrating on this aspect, I do not wish to imply in any way that the rights of the refugee in relation to the receiving country are of less significance. Nor do I wish to deny that the refugee situation is a state of exception requiring principles of conduct appropriate to that state. On the contrary, I believe that the rights of the refugee remain of fundamental importance in the protection of the refugee. I wish only to consider an important but neglected area of law whose development will lead not only to a more comprehensive and balanced approach to the refugee issue but will also reinforce the entire structure of refugee law by relating it more satisfactorily then hitherto to law *generally*.

This development at the universal level began with the Canadian initiative within the United Nations Commission on Human Rights in 1980 to examine human rights and mass exoduses with a view to the elimination of the causes of exoduses, and with the concurrent German initiative within the United Nations General Assembly to consider measures to avert mass flows. Both these initiatives have since been joined together under the item "Human rights and mass exoduses" which is now on the agenda of both the General Assembly and the Commission on Human Rights.

At the regional level, however, the necessity of a comprehensive and coherent approach has been insisted upon from the late 1940s onwards by newly independent States, especially in the context of refugee situations arising from the denial of the right of self-determination.

In the initial debate in the Commission on Human Rights, the representative of Canada observed that the duty of expressing international solidarity in the face of the problem of massive movements was twofold: to assure protection and assistance and to share the burden placed on countries of first refuge, and to contribute to the elimination of the causes of exoduses. These two aspects, the Canadian representative added, were inextricably linked and were of equal importance.

In emphasizing that international solidarity required a contribution to the elimination of the causes of exoduses, as well as to extend protection and assistance, the Canadian proposal broke significant new ground in the post-war Western thinking on the refugee issue.

In its observations to the Secretary-General on its own proposal, the German Government observed that its initiative was an integral part of a comprehensive concept transcending humanitarian action and embracing the establishment of a system of preventative measures. From the conceptual point of view, it said, the efforts of the international community had until now centred on the humanitarian task of mitigating the consequences of flight and expulsion. Measures to eliminate the causes of flows of refugees were not seriously considered.

Shortly after these two initiatives were taken, the subject of voluntary repatriation was also proposed for study by the international community with a view to developing the approach to it. Hitherto, return had been the most neglected aspect of the solution of the refugee problem, the traditional Western emphasis being directed mainly to external settlement.

In 1985, UNHCR took the initiative to place the subject of voluntary repatriation on the agenda of its Executive Committee. In line with the developing broad human rights approach and with the increased emphasis on the responsibility of the country of nationality, the ensuing Conclusion on Voluntary Repatriation which was adopted by the Executive Committee and which was subsequently endorsed by the General Assembly contained two new and significant provisions. They stipulated:

(*a*) That the basic right of persons to return voluntarily to their country of origin was reaffirmed and it was urged that international co-operation should be aimed at achieving this solution and should be further developed; and

(*b*) That the responsibilities of States towards their nationals and the obligations of other States to promote voluntary repatriation must be upheld by the international community. International action in favour of voluntary repatriation, whether at the universal or regional level, should receive the full support and co-operation of all States directly concerned.

With the inescapable recognition that the refugee issue involved basic aspects of individual human well-being as well as the aspects of peace and security, it had gradually been accepted that a comprehensive and coherent response must address the full range of human rights issues involved as well as the inter-State issues, and that it must do so in a balanced and integrated manner which reflected the fundamental interdependence of both aspects.

This recognition flowed logically from the United Nations Friendly Relations Declaration of the late 1960s which included within a general framework of basic principles the principle that States shall co-operate in the promotion of universal respect for, and observance of, human rights. This recognition was reflected also in the 1986 report of the Group of Experts which was set up by the General Assembly under the German initiative. The 1986 recommendations included two key provisions:

(*a*) In view of their responsibilities under the Charter of the United Nations and consistent with their obligations under the existing international instruments in the field of human rights, States, in the exercise of their sovereignty, should do all within their means to prevent new massive flows of refugees. Accordingly, States should refrain from creating or contributing by their policies to causes and factors which generally lead to massive flows of refugees; and

(*b*) States should co-operate with one another in order to prevent future massive flows of refugees. They should promote international co-operation in all its aspects, in particular at the regional and sub-regional levels, as an appropriate and important means to avert such flows.

Thus, the "holistic" approach to the refugee issue came to prevail over the limited approach of the past which effectively to a great extent separated immediate "humanitarian" concerns arising on the occurrence of a refugee flow from the broader range of individual and social considerations in regard to prevention and to return as well as to external settlement.

The new approach provides the international community with an important opportunity. In working out the implications of the "holistic" approach for the contemporary international legal and policy response to the refugee issue, the international community will engage itself in an invigorating and creative task to make that response more just and practical and, thus, better suited to meet contemporary and universal needs. Most importantly, the international community will be offered the possibility of bringing about a new and more fruitful period of international co-operation in the solution of the refugee problem.

It was with this opportunity in mind that UNHCR, in conjunction with the International Institute of Humanitarian Law at San Remo, convened in 1989 a round table of experts to examine the issue of the solution of the refugee problem and the protection of refugees. The stated purpose of the round table was to consider how law, policy and action could be developed progressively in regard to the critical aspect of solution in a manner which was in accord with the purposes and principles of protection. In explaining its initiative, UNHCR observed that various aspects had so far been dealt with separately but there had never been a comprehensive examination of the subject. Such an examination had become imperative as the international community was increasingly dealing with protection problems not separately but in the overall context of solutions. It said that the refugee problem should be seen *as a whole* and any international efforts in this regard should take into account all aspects of the problem, including the causes of refugee flows, the interim protection requirements and the solution.

Among the significant tentative conclusions for further study and consideration that were adopted by this round table, the following are of particular note:

1. Solution should not be seen as an aspect independent and separate from protection. It should be seen as the final purpose of protection, and protection should be seen as governing the entire process towards solution and as determining what was or what was not a solution.

2. In broad terms, the problem of the refugee was basically that of the denial of freedom of movement to the individual by reason of conditions in the country of nationality which compelled him to depart from that country or to stay abroad and the inability or unwillingness of the individual to avail himself of the protection of the country of nationality.

3. Solution, therefore, was either the prevention of conditions occurring within the country of nationality which compelled a national to depart or remain outside the country of nationality so that the national was without national protection *or* the remedying of such conditions having that effect (i.e. the "basic solution"). It was only in the eventuality that the basic problem of denial of freedom of movement could not be solved that the solution of the resulting problem (but not the basic problem) became the enablement of the refugee to settle in another country (i.e. the "contingent solution").

4. This concept of solution, including the two orders of solution, had important implications for law, policy and action. It was clearly impossible, in the light of this definition of solution, to treat the three traditional "solutions" of voluntary repatriation, local settlement or resettlement as of equal order. Voluntary repatriation was the basic or primordial solution. Moreover, prevention was a further aspect of solution which should not be ignored in an approach which was comprehensive and balanced.

The centrality of human rights in the broad approach outlined in these tentative conclusions is self-evident.

In the same year, the UNHCR Executive Committe welcomed the importance given in the report to, *inter alia*:

(*a*) The interrelationship between protection and solutions, as well as the desirability of prevention, including through the observance of human rights, as the best solution;

(*b*) The strengthening of joint international efforts to deal with causes of flows of asylum-seekers and refugees in order to avert new flows and to facilitate the voluntary repatriation of refugees where this is the most appropriate solution to their problems; and

(*c*) The examination, where required, of existing law and doctrine in the light of the real situations being faced by refugees, taking into account the relevance of human rights principles in this context.

The subject of protection and solutions has now been referred to an open-ended working group of the UNHCR Executive Committee, with the request that it examine it in a comprehensive and coherent manner.

It seems clear that the acceptance of the refugee problem as, by and large, that of *coerced* movement, a characterization adopted recently by the United Nations General Assembly in its consideration of the German item, poses directly the human rights issue of *freedom of movement*, including such particular aspects of that freedom as the right to remain in, or to return to, one's country of nationality, and to enjoy therein one's rights, and the related prohibitions of exile, expulsion and the arbitrary deprivation of nationality

The acceptance of this characterization of the refugee problem means that the problem of the refugee is basically that of the individual and, accordingly, is not basically one concerning immigration controls or conditions of stay abroad. Problems concerning these controls or conditions are consequential or contingent aspects of the basic problem; they result from the denial of freedom of movement to the individual and not vice versa. These consequential or contingent problems, therefore, are normally resolved when freedom of movement s restored to the individual.

It means, too, that the human rights issue within the refugee context can no longer be considered as solely, or mainly, that of refugee or asylum; it must be considered a broader issue relating also to that of freedom of movement in relation to the country of nationality.

In the thinking on solutions to the refugee problem, the human rights issue of exile must now find its proper place. By "exile" is meant, of course, not the limited concept of formal banishment but the broader one familiar to "lay" usage of involuntary separation from the country of nationality.

It must be recognized that exile is generally an evil, since it is, by definition, an involuntary separation from the homeland. It is not to be confused with voluntary migration. While it may sometimes be the lesser of two evils, none the less the coerced character of the movement cannot be considered unobjectionable, let alone positive. In the vast majority of cases of coerced movements, the individual's decision to leave, where the individual is not actually expelled, is a difficult and painful one, frequently involving considerable risks and sacrifices. Exile necessarily involves the loss or deprivation of almost all rights that are enjoyable solely, in whole or in part, within the country of nationality. Furthermore, conditions of exile today for most of the world's refugees are desperately hard, sometimes dire. Relatively few reach havens of peace and prosperity where they can begin a new and meaningful life. Most are confined to camps on the borders of their countries of nationality, living precarious existences and dependent for their survival on outside charity. Some find themselves in situations worse than they knew at home, with no immediate hope of return. Many of them have been without a solution of their problem of *de facto* or *de jure* statelessness for decades. For most, the only solution will be their voluntary return one day to their country of nationality, when conditions permit.

Political realism, too, requires such an approach today. The numbers of refugees world-wide have reached such proportions that in many cases the economies of the receiving countries are overstrained, their internal public order is endangered and international peace and security are threatened. In many cases today, the receiving countries have no political or economic interest in settling the refugees; on the contrary, their interest is often seen as lying in the early return or the resettlement of the refugees elsewhere, where that is possible.

The human and political cost of the contemporary phenomenon of exile is high. Many millions of homeless people are undergoing traumatic ordeals and not only the stability and peace of regions are being affected, but also the stability and peace of the entire international community. The refugee issue now far surpasses a simple issue of charity: in every sense, it is a major international political issue.

In the present situation, it is imperative that international law and co-operation be developed in a broad and balanced way so as to meet the basic issues of freedom, justice and peace which are directly raised by the refugee problem.

Since exile cannot be considered, either in justice or with realism, as the main solution for today's refugee problem, the rights of the individual in relation to the country of nationality—and, it should be added, in relation to other countries in regard to the country of nationality—must now be examined in the specific context of the refugee issue, especially in regard to the principle of freedom of movement.

While this has barely been done in the past, it is encouraging that the recent significant shift in international thinking towards a broader and more universal approach to the refugee issue is leading finally to the examination of these rights.

Within the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights, the right of everyone to leave any country, including his own, and to return to that country is now being considered for the first time within the refugee context as well as within other contexts. When this subject was first examined by the Sub-Commission nearly 30 years ago, the "immigration" issue was excluded from the scope of its work.

It is to be hoped that in its treatment of the aspect of return, the Sub-Commission will deal not only with the problem of deprivation of nationality but also with the problems of expulsion and exile, and that it will consider not only the problem of *direct* denial of rights or violation of prohibitions but also with the problem of *indirect* denial or violation. This latter aspect has largely been ignored until now but is especially relevant to the refugee problem today, and an increased understanding of its significance may lead to a major and beneficial development in international thinking in regard to human rights and State responsibility.

As far as the doctrine of State responsibility is concerned, respect for human rights is, of course, an important aspect of the substance of the law. While this area of the law is still in an early stage of development, the process of its codification by the International Law Commission being slow and not without difficulty, there is already a substantial and growing practice in regard to its application to the refugee problem.

There is a cogent case to be made for its further and urgent development. At the formal level of codification of principles of responsibility and its consequences, the significant recommendations adopted in 1986 by the United Nations General Assembly in regard to international co-operation to avoid further mass flows of refugees could usefully be developed to cover not only the prevention of such flows but also the situation where such flows had already occurred or were still in the course of occurring. At present, no principles have been adopted to cover these latter situations.

In the analysis of preventions within the General Assembly Group of Experts, a significant limitation existed in the restriction of the enquiry to the *pre*-flow aspects of the problem, leaving aside the consideration that prevention can be a concern not only *before* a flow has taken place but also *during* a flow. Most large-scale flows occur over a fairly extensive period of time, and in such situations the concern will not only be for a response after a flow has begun but also for a response before it could continue. The concern, therefore, will have both a remedial and a preventative dimension which will have to be integrated in order to permit an overall, coherent and effective response. The significance of this aspect was grasped by a Round Table on Pre-Flow aspects of the Refugee Problem which was convened by the International Institute of Humanitarian Law in 1982. In its report, the participants noted that:

> it was desirable to understand the interrelationship of the pre-actual and post-flow aspects of a single continuum and the significance of that interrelationship after a flow had commenced in relationship to immediate response and eventual solution . . .

It is notable that within the General Assembly the general principle of international co-operation in solving refugee problems has been invoked by several States in recent years in the debate on the item entitled "Development and strengthening of good neighbourliness between States". This principle has also been implicit in a number of recent international agreements or arrangements for responding to this problem.

Also of particular interest in this regard are two significant provisions which were included in the Conclusion on Voluntary Repatriation which was adopted in 1985 by the UNHCR Executive Committee and which was subsequently endorsed by the General Assembly. These state:

(*a*) The existing mandate of the High Commissioner is sufficient to allow him to promote voluntary repatriation by taking initiatives to this end, promoting dialogue between all the main parties, facilitating communication between them, and by acting as an intermediary or channel of communication. It is important that he establishes, whenever possible, contact with all the main parties and acquaints himself with their points of view. From the outset of a refugee situation, the High Commissioner should at all times keep the possibility of voluntary repatriation for all or for part of a group under active review and the High Commissioner, whenever he deems that the prevailing circumstances are appropriate, should actively pursue the promotion of this solution; and

(*b*) When, in the opinion of the High Commissioner, a serious problem exists in the promotion of voluntary repatriation of a particular refugee group, he may consider for that particular problem the establishment of an informal *ad hoc* consultative group which would be appointed by him in consultation with the Chairman and the other members of the Executive Committee and should in principle include the countries directly concerned. The High Commissioner may also consider invoking the assistance of other competent United Nations organs.

Especially notable are that these provisions allow to the High Commissioner a right of initiative in promoting voluntary repatriation and in the taking of measures to achieve that goal and include also the direction that the High Commissioner should actively pursue the promotion of this solution whenever he or she deems that the prevailing circumstances are appropriate.

At the practical level, a more comprehensive and coherent approach will entail a major revision of the priorities of practical action at every relevant level, including the political, diplomatic and assistance levels. It will entail considering how international organization, whether universal or regional, can be utilized satisfactorily and how the role and responsibilities of existing bodies, such as the Office of the United Nations High Commissioner for Refugees, should be seen today. It cannot be said that this revision has yet occurred or that much of the action has been adjusted in conformity with the newly emerging legal or policy approach. Truth requires admitting that, while the principles may have significantly changed, the practical action has barely altered.

This is unfortunate as the failure to develop sufficiently practical action in support of a broad and principled approach is inevitably leading to pressures to adopt short-term repressive measures which are at variance with longer-term human rights considerations. Increasingly, protection is coming under threat.

It is axiomatic that, in a broad human rights approach to the refugee problem, the emphasis on prevention and return as well as on the obligations of the country of origin or of other countries in relation to the country of origin must not detract in any way from or be allowed to undermine the responsibility of the receiving country and the fundamental importance of principles for the protection of refugees, including those of prohibiting refoulement or providing for asylum or, where necessary, the solution of external settlement. In a broad human rights approach, it is essential to take fully into account that the refugee situation is one of exception and that international protection is necessary precisely because the individual is unable or unwilling to avail himself or herself of national protection for the reason that makes that individual a refugee.

For this reason, the UNHCR Executive Committee has welcomed the importance given in the 1989 San Remo report on solution and protection to the promotion and strengthening of the traditional principles and safeguards, which, the Committee noted, remain fundamental to the protection of refugees in countries of asylum or refuge as well as, on return, in countries of origin.

The broad human rights approach must serve, therefore, to reinforce existing principles for the protection of refugees, and it will do so by developing a structure of protection which is comprehensive and balanced.

Human rights are an important source for the development of the protection of the refugee within the receiving country. For example, the relevance of the prohibition of cruel, inhuman and degrading treatment to the application of the principle of non-refoulement has already been recognized by human rights bodies and by new international human rights instruments. Moreover, human rights principles are clearly applicable to procedural aspects of the determination of refugee status as well as to conditions of presence, in regard to such aspects as detention and personal status. When, in 1982, the UNHCR Executive Committee adopted a significant set of minimum basic human standards for the treatment of asylum-seekers who have been temporarily admitted in a country pending arrangements for a durable solution, express reference was made within the Conclusion to the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights.

I will conclude this paper by saying that human rights in the refugee situation serve to strengthen and enrich refugee law in a dynamic way by ensuring that the law responds in a humane and practical way to actual human and social needs. They ensure, too, that the refugee problem is seen, basically, as a human problem, and that it is addressed as such in a manner which is both comprehensive and coherent. It would be inadequate to say just this, however, without adding that the realization of respect for human rights requires social and economic development at the national and international levels. Respect for human rights cannot flourish in a world where oppression, injustice and violence are widespread and endemic. Today, freedom, justice and peace should be subsumed within a larger notion of development. While respect for human rights promotes development, it is equally true that solidarity and co-operation in development promote respect for human rights.

Blurred vision in the rich world and violations of human rights—a critical assessment of the human rights and refugee linkage

*Peter Nobel**

On the nature of human rights

There are some traditional ways of thinking about human rights which may deserve humble intellectual attention but which, in my view, have obscured the true origin of that dream of mankind which is called human rights. From the outset in this paper I am going to question two of them in order to illustrate how a true conception of human rights is necessary for a correct and realistic understanding of what is called the "Refugee Problem", which of course is not a refugee/problem at all. It is a conglomerate of many problems, some of which are not difficult to recognize—if the political will is there to see them as they are—while others might be more complex and require research to be better understood.

Many lawyers of a religious or philosophical bent tend to see the International Bill of Human Rights as "natural law", something given and there to be discovered like the law of gravity. I heard a Catholic colleague expressing himself recently: "Human rights are a gift from God". Some of these thinkers aim at distinguishing such "natural law" from "positive law" which can always be upheld by the sanctions of power of one kind or another. The most brilliant minds have been engaged in this discussion. But I myself am not very interested in it because I think it leads us away from the realities.

Human rights have developed by steps and by jumps, the greatest of which have been inspired by the greatest amount of human suffering. The French and American revolutions generated the lists of grievances from which people demanded to be liberated. The constitutional rights emanating from these revolutions are merely a summing up of the experience of that suffering which the people did not ever want to undergo again.

---

* Jur.D. H.C.: Swedish Ombudsman against Ethnic Discrimination.

When the surviving remnants of independent States laid the foundation for the United Nations and adopted in 1948 the Universal Declaration of Human Rights,[1] it was a summing up of what looked like, and certainly by most standards was, the most horrifying experience of our species. Reading through the articles it is as if there was a scream between the lines, that *never more* shall there be such cruelty, such horrible torture, such racism, such persecution, such genocide, such war-mongering, such mass killing, such utter destruction. There is therefore nothing mysterious about human rights. They are based directly on the worst of human experience and a strong desire to avoid a repetition. It is as simple and as direct as that. If mankind's memory is short, those of us who share the view that those evils should not be repeated have a duty to revive that memory. Philosophers and historians may have a legitimate interest in tracking the concepts adopted when people in agony wanted to formulate the absolutes which they, having survived, thought contained the formula for a safer and a better life. But such scholarly interest must never prevent us from seeing the true origin of human rights, which is shared human experience. If the human rights are thus felt to be close and important to all of us, it may be easier for us to understand the situation of refugees whose rights have been denied, threatened or violated.

On the relation between humanitarian law, human rights law and refugee law

The second critical point which I would like to raise is on the traditional divisions between humanitarian law, human rights law and refugee law. It is as if there has been one coterie of humanitarian law experts, another devoted only to human rights law and a third concentrating on refugee law, the three groups meeting at quite different seminars and conferences, researching and writing strictly within their field and with more barriers than channels of communication and exchange between them. I hope that I am correct in observing that this strict trisection is breaking up because it is academic, artificial and has hindered a clear view of refugee definitions and the many obvious links between what should be seen as three branches of the same tree rather than as three different trees.

It is very clear that refugee law is an inseparable part of human rights law as follows from article 14 (1) of the Universal Declaration of Human Rights: "Everyone has the right to seek and to enjoy in other countries asylum from persecution". Persecution can be denied as a violation of basic human rights. We must be aware, however, that methods of persecution change as do the concepts of basic human rights. The 1951 Convention relating to the Status of Refugees[2] along with many other international and national legal instruments referring to or relying on it, spells out in detail the right to seek asylum from persecution. The 1951 Convention does not solve the problem of territorial asylum;[3] however, it remains a fact that the definition of a refugee under the Convention revolves around our understanding of human rights.

---

[1] Notes appear at the conclusion of this article.

Most of the unhappy millions who have been forced to flee their country or region of origin have not been exposed to direct persecution. They have been uprooted by a variety of other causes even more complex and variable than the recognized methods of persecution. Thus, only a minority of the world's refugees are covered by the 1951 Convention. Still, it is an undeniable fact that they have been forced to flee. Hence the term *de facto* refugee, generally accepted by experts all over the world, but shunned by Governments and their spokespeople in rich Western countries. We will return to this question later.

The need for protection and assistance for the *de facto* refugees was quickly recognized, as was the sad fact that the international political climate has been for a long time, and still is, distinctly unfavourable to a widening of the universal definition of the 1951 Convention. This is one of the explanations behind Western Governments' refusal to let the word "*de facto* refugee" pass their lips, preferring more obscure phrases like "safety seekers in a refugee-like situation" and the like. So the world community had to take a different approach. The United Nations met the problem early on. In 1956 there were refugees from the upheaval in Hungary, few of whom qualified as Convention refugees. Chinese refugees in Hong Kong drew attention in 1957 and 1962. Africa has been the region most frequently affected, beginning with the Algerian war of independence and followed by tragedies like those in the Horn of Africa, in Tchad and under the *apartheid* régime. One by one new refugee situations in various parts of the world prompted the General Assembly or the Economic and Social Council to adopt special resolutions on an *ad hoc* basis, recommending the States Members to extend to these groups protection and assistance and putting them under the mandate of UNHCR. These resolutions now number more than forty.[4] There is reason to dwell upon one particular General Assembly resolution which grants everyone the right to refuse service in military or police forces employed to uphold the *apartheid* system and recommends that States should give full Convention refugee status to refusers and deserters from such forces.

Parallel with the foregoing within the United Nations system, there were new developments at regional level, and an important start was made in Africa. The reader will recall this well-known event: The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa whose refugee definition confirmed the 1951 definition, then added in article 1.2:

> The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[5]

The importance of this definition has been emphasized by the General Assembly.[6] The definition was reiterated in the conclusions adopted in 1981 by the UNHCR Executive Committee with respect to the problem of protection in cases of mass influx of asylum-seekers.[7] In the same year the definition was strongly recommended in the Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia.[8] Finally, we see the same definition, originally African, appearing in 1984 in the Cartagena Declaration by 10 States in Central and South America.[9]

The African definition of the *de facto* refugee has thus won widespread acceptance, obviously because it has been found to be an excellent tool for dealing with such refugee situations. In Europe, however, there is no such acceptance nor is there any other agreement on how *de facto* refugees should be recognized. Only in Sweden in 1975 and Denmark in 1983 have they been granted the right to asylum by domestic legislation, but in December 1989 Sweden suspended that right and may eventually abolish it altogether.[10] Practice in the other countries of Europe and North America has varied and offers no reliable rule of law for other safety-seekers than those covered by the 1951 Convention—if even for them!

The confusion in the rich countries over who the *de facto* refugees are in relation to the Convention refugees and to the human rights system has inspired much discussion. One way to resolve this might be to see Convention refugees as victims of denial of humanitarian law protection.[11] Though this might be helpful in some situations, I am of the view that it might lead to oversimplified or erroneous conclusions in others:

If a prisoner of war is tortured because of his race or his religion, is that not a violation of both humanitarian law and human rights law?

If an ethnic minority in a remote part of a country is being persecuted by a majority and the central Government does not have the means or the power to interfere, is that a situation which generates Convention refugees or *de facto* refugees?

If villagers are killed, raped, robbed, by criminals, irregular armed forces or army troops gone completely out of control, those villagers are not persecuted by a Government or its agents and they are clearly entitled to protection as *de facto* refugees, but have their human rights not been violated at the hands of the perpetrators of these deeds?

These examples should make it clear not only that humanitarian law and human rights law are branches of the same tree but also that these branches are intertwined and that they do have relevance for both categories of refugee.

There are also other situations where the humanitarian law criterion is not sufficient to establish *de facto* refugee status. There are many examples of armed conflict or other political events causing serious and widespread environmental destruction which uproots the local population, aggravated by political neglect or incompetence, and drives people away to safety. Many of these victims could and should be considered *de facto* refugees, but one cannot say that they have been exposed to violations of humanitarian law.

In concluding this section, we may say that the key concept in the definition of a Convention refugee is a "well-founded fear of persecution" and the key to understanding who is a *de facto* refugee is the existence of "events seriously disturbing public order". Both categories are still related to both human rights and humanitarian law just as they are sometimes intertwined in the field of practical application.

The blind fear of the rich of an equally blind mass invasion of the poor

At this point, I would like to recall the period of the 1930s when some people successfully tried to frighten Europeans with "the yellow peril". Impressive demographics were used in those days to indicate that the Chinese and other peoples in the Far East were propagating at a terrifying rate and that as a result they could be expected within a short time to flood Europe—and eventually the United States. This picture was held up as a threat and inspired a certain horror propaganda. Movies and thriller novels were spun around the theme of the evil minds and absolute unreliability of Asian peoples and their leading criminal masterminds. As we all know, the prediction of a yellow threat did not and has not come true. Instead, a very different threat—whose colours were brown and black—bearing the names nazism and fascism rose into horrible reality from the midst of the Europeans themselves. Since those years of my childhood I have acquired a certain scepticism concerning "prophets" who enter the market place threatening rich countries with mass invasions of one kind or another. I want some empirical or scientific proof before I am prepared to take such predictions seriously.

During the 1980s Western Governments as well as the public were eagerly fed with the notion that a mass influx of disappointed and frustrated people from the poor and underdeveloped parts of the world could be expected within a short time. Through improved communications they would learn about incredible luxuries and wealth in the first world, sell their belongings, which would suffice to buy the necessary return air ticket, and get going. Of course there are such cases, but I know of no proof or indication of significant numbers. During the 1960s and 1970s when, for example, Western Europe actively recruited foreign labour, there were among the migrant workers people who would have qualified as refugees but who did not bother to go through the determination procedures when they were welcome to jobs and housing without preliminaries. Today, when recognized refugee status—or family relationship—is the only safe ticket of entry, there are of course not a few migrant workers among the asylum-seekers. But such phenomena after all are limited. The total number of applications for asylum in Western European countries barely exceeds 200,000 and should certainly not be confused with the real number of asylum-seekers, as a large portion of these—maybe most of them—apply in more than one country.

The point to be made here is that no economic catastrophe in the third world ever resulted in any notable increase in the number of asylum-seekers in the first world. On the other hand, every such increase has been directly related to a political event involving strain and danger for the people concerned. Examples of this are numerous: Hungary 1956; Prague, 1968; Chile, 1973; Lebanon since 1975; Eritrea since about the same time; Afghanistan since 1980; Iran and Iraq since about the same time; Turkey from September and Poland from December 1981; and later conflicts in Central America, Punjab in India, and Sri Lanka. A complete list would be very long.

Poor people walk long distances only as long as their legs can carry them or until food, water and shelter are found or until they succumb or they are stopped. The vast majority of refugee populations live in the immediate vicinity of the only international frontier they have ever crossed—and which they are only going to cross again when the time comes for their safe and voluntary return. In the mean time, they survive on their own food production and international assistance. Only a very few of them have the money, the contacts, the family connections, the knowledge or the inner energy to propel them onwards. These are the annual average of 3 per cent of the international refugee population presenting themselves as asylum-seekers in Australia, New Zealand, Canada, the United States and Europe. There is no evidence that there is any imminent mass invasion of poor people. They are in every aspect too poor to achieve it. That post-colonialism and certain patterns of economic domination do create limited movements of a few million job seekers, e.g. from former French colonies to France, from Zaire to Belgium, from Central America to the United States and from the poorer to the richer members of the Commonwealth, does not profoundly alter the fact of the immobility of the world's poor millions. Of course with development, including constantly improving communications, some of the suffering peoples of the world will acquire mobility, but empirical indications are that this will remain a successive and continuous process, which can be presently handled as it has been until now. Exaggerated fears of unreal dangers, however, might block our thinking and prevent appropriate action.

In 1990 a new threat was sketched out by those who indulge in this kind of artistry. "The yellow peril" as well as the starving millions have been forgotten in order to focus on the new danger: the mass invasion from Eastern Europe. Hardly had the Berlin Wall been pulled down when cries of fear were heard for even stronger defences around the rich industrial countries in the West. Worse, at the end of the year the public was frightened by daily speculation about an imminent mass invasion of Russians and others. But the latter are not allowed in by the countries of Western Europe. Whatever one might think about the matter, the fact is that those who are now allowed to leave their countries are not allowed to enter ours. Whatever the respective merits of the concepts of Convention refugee *vis-à-vis de facto* refugee, something like a new Marshall Plan—close co-operation between European countries in a humanitarian spirit—is the obvious path to take.

When in the beginning of this century the Italians, the Irish and the Scandinavians emigrated in waves to North America it was very much because they were welcomed there, granted free land and good employment opportunities. It was not only because they were extremely poor in their home countries.

Those who continue to encourage blind fear of imminent mass movements do not serve the truth based on experience. They spread unfounded or exaggerated fears tending to inspire inappropriate action, which is not designed to address the real problems. It is better to see the realities.

Accepting the realities

At this stage I will list a few statements which have the character of well-founded hypotheses. Research would in all probability confirm them. Such research would also serve the purpose of giving Governments better guidelines than those which they have been following in the last decade when groundless threats, like the one discussed above, influenced the attitudes of Governments and public alike, causing a great deal of harm—like the new expressions of racism.

In the past forty years the rich first world countries have received so many *de facto* refugees that it would not have made any difference if they had agreed to an expanded international definition as suggested above. In fact, it would here have helped clarify and identify those circumstances which were insufficiently clear-cut to merit recognition as refugee-like situations.

The overwhelming majority of individuals who, according to legally valid decisions by competent organs of the countries in the rich first world should be expelled, rejected or deported, are still in those countries, which shows that all the efforts at control and the ensuing traumatic drama have been a waste. All the efforts of the rich first world countries to restrict immigration and to improve immigration control have not resulted in a decrease either in the number of refugees or asylum-seekers in the world or in the number of immigrants, legal as well as clandestine. On the contrary: in spite of all the harsh measures, the numbers have been growing considerably. This is considered a problem. Sometimes I think that this is not the immigrants' problem, but rather a problem of the host countries. I certainly think that the problem is not one of numbers. The problems are elsewhere. They are with the will or lack of will, with political leadership or lack of political leadership. Certainly they are related to multi-ethnicity and a new pluralism more than anything else.

If these assumptions are correct, as I am convinced they are, the legal, political and social systems of the rich countries of the world would benefit by using openly a valid definition of what constitutes a refugee. Acceptance of the realities might also help them at least make a start in doing something really constructive about the universal refugee problem, and at the same time make real progress in the fields of human rights and humanitarian law."

"All human beings are born free and equal in dignity and rights" —Article 1 of the Universal Declaration of Human Rights

There are reports, which neither reading nor travelling has given me any serious reason to doubt, that between forty and sixty million people in the United States and Western Europe are so utterly poor and neglected that they have no homes, roof or shelter, nor any guarantee of the next day's food. The same countries, which harbour a very small proportion of the world's population, consume the major proportion of its resources. Mahatma Gandhi is quoted as having said: "The resources of the Earth will always be sufficient for Man's need but never for his greed." These same countries increasingly take on the character of a consumer's paradise for those legally allowed to be there and endowed with enough money, but a valley of darkness and suffering for their own less fortunate brothers and sisters as well as tough police States for other nationalities. In other words, these States do not today seem to be founded on the basis of respect for the fundamental principle that all human beings are born equal.

As it is obvious that this state of affairs cannot prevail for ever, I mention it with the conviction that only such thinkers and politicians as look to the future have any connection with it. The rest is silence and belongs to the "Heart of Darkness".[12]

A few other facts

More than 90 per cent of the world's refugees have been driven away from poor countries in the third world to neighbouring countries, equally poor or even poorer. More than 90 per cent of them have fled from armed conflict of one kind or another. It is also important to note that less than 10 per cent of the weapons with which these battles are fought are manufactured in the third world. The major portion is exported to them from the rich countries.

The strategic games of the super-Powers have often received more attention than their impact on the people in this or that country. The super-Powers have, in the past, frequently closed their eyes to gross violations of human rights or humanitarian law by allied régimes rather than risk them turning to the other side. This has instilled a general atmosphere of hopelessness in human rights advocates all over the world. It has also generated large movements of asylum-seekers.

The Iraqi régime has long had a very bad human rights record, but in spite of this has been equipped with all the tools of death and torture, including those weapons under international ban. Iraq was not thus equipped by third world countries. No—the relationship between the rich countries and this régime illustrates how Western business and export practices directly support violations of human rights and cause millions of new refugees.

There are today other régimes, with a comparably bad record in the field of human rights, which consequently also generate refugees. Should the international community not undertake a survey and inspire action towards diminishing the risk of human rights violations and new refugee situations which is fostered by the continued support in various forms of such régimes?

It is excellent business when, for example, there is a war between two States producing a commodity like oil on which the rich world is utterly dependent for its present life-style, and the rich countries sell weaponry to both sides, amassing credit to buy the raw materials so vital to their economic life.

Most of the contemporary refugee situations, like the Iran-Iraq war or the Gulf War are in many ways the direct or indirect results of first world policies which did not aim at such results but which on the other hand cared little for human rights standards under their trading partner's jurisdiction.

There is a particularly evil aspect to this which can be called the militarization of the third world. In all probability, the rich Western countries by their export of weapons have not only fuelled a number of horrible armed conflicts violating human rights, humanitarian law and creating floods of refugees in many poor parts of the world, but have also managed to pervert and reverse the process of development itself. If a developing country spends 30 per cent of its revenue on military expenditure, it is probable that the country will increase its debt, neglect development and trade and promote the rise to power of military men who are mainly interested in further militarization. The colonial inheritance left some very perverted soldiers in possession of the key to power, when they had little idea of how to put it to proper use. At the time of Uganda's independence when he took command of the country's military, Idi Amin was an NCO of the colonial armed forces, the East African Rifles. Bedel Bokassa the former self-styled emperor of the Central African Republic had served for almost 20 years in the French Foreign Legion and reportedly also in Indochina. There are others, still in power. There have been more than 80 military coups in Africa alone since the establishment of the Organization of African Unity in 1964.

It is white people who are responsible for the militarization of the third world. Sometimes I wonder whether this crime, in terms of human beings killed, human rights violated, people uprooted or mutilated or property destroyed, does not surpass the crimes of the slave trade and colonialism. The verdict rests with future historians.

Of course, it is well known that economic and social development permits respect for human rights in the widest sense, thus preventing new refugee situations. The concept could be described as a three-legged stool. To succeed in a development project, three things are needed: (*a*) The developmental input as such, be it money, tools, know-how, seeds, expertise or whatever; (*b*) The participation of the people involved or directly concerned, who must take an active part in the planning, the implementation, the continuous evaluation and the post-evaluation of the project: how could anyone be sure of success unless the people's desires, competence, know-how, taboos or limitations are known? and (*c*) The respect for these people's human rights and dignity as well as their civil and everyday rights: if these are not granted, how could their involvement and their participation so vital to success be secured?

Possible and realistic action

The International Bill of Human Rights includes humanitarian law, human rights and refugee law. It is absolutely clear that no single State can solve all the problems alone. Temporary restrictive measures to stem the influx of immigration can have short-term effects, but always at the expense of a neighbour in whose backyard the problem is being dumped.

Gross violations of humanitarian law or human rights law can no longer be considered the internal affairs of sovereign States if the result is the arrival on the territories of other States—most of which are the poorest in the

best copy available

world—of thousands or hundreds of thousands of seekers of safety and the bare material necessities and, ultimately, a decent life!

Only if there were full international co-operation could something be achieved. Following support by States of international, intergovernmental and non-governmental organizations, such co-operation could aim at:

Developing a common definition of the concept of *de facto* refugee;

Agreements on responsibilities of the first asylum country with the ultimate goal of establishing, for humanitarian reasons, joint regions of asylum;

Concerted action by several countries—e.g. within the Council of Europe—towards development assistance with real impact and effect in areas in need and where human rights violations threaten to generate refugees;

Initiating action towards mediation or conciliation in cases of ethnic conflict (a very serious issue, which the limited space has not allowed me to dwell upon in detail);

Establishing an embargo on arms sales to areas likely to erupt into armed conflict, with the almost inevitable result of creating refugees;

Closer international concertation so that, in time of crisis there is no doubt about the common attitude towards threats to international peace, human rights and harmony;

Fostering in the international community greater intolerance of régimes violating human rights and generating refugees.

NOTES

[1] General Assembly resolution 217 A (III) of 10 December 1948.

[2] United Nations, *Treaty Series*, vol. 189, p. 1377.

[3] Atle Grahl-Madsen, *Territorial Asylum*, Oceana Publications Inc. London and New York, 1980.

[4] United Nations resolutions and decisions relating to the Office of the United Nations High Commissioner for Refugees, published at United Nations, Geneva (HCR/Inf.49).

[5] United Nations, *Treaty Series*, vol. 1001, No. 1460.

[6] General Assembly resolution 34/61 of 29 November 1979.

[7] HCR/IP/ENG/REV.1980.

[8] International Institute of Humanitarian Law, San Remo, 1981.

[9] Cartagena Declaration on Refugees adopted at the Colloquium on International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, Cartagena, Colombia, 19-22 November 1984.

[10] Peter Nobel: "What happened with Sweden's Refugee Policies?", *International Journal of Refugee Law*, vol. 2, No. 2, Oxford, 1990, p. 265.

[11] Göran Melander: "The two Refugee Definitions", *Report No. 4 of the Raoul Wallenberg Institute*, Lund, 1987.

[12] Referring to the novel by Joseph Conrad.

The rights of refugees under international law

*Igor Khokhlov**

Introduction

A principle of international law can be understood as a normative idea, wide in scope, usually exceeding that of an individual legal rule.

General principles of international law[1] reflect the essential features peculiar to this social phenomenon. Each branch of international law possesses its own set of principles.[2]

The singularity of the International Bill of Human Rights lies apparently in the fact that nearly all the rules contained therein are in the nature of principles, developed in the various branches of which international human rights law is composed. International refugee law is viewed in the present article as one such branch. It too possesses its own set of principles,[3] some of which are more imperative than others which are interconnected, and each of them is to be read in the context of all the other principles of refugee law, human rights law and international law in general.

1. Fundamental principles of international refugee law

(*a*) The leading principle of international refugee law as a branch of human rights law is that of *asylum*, which is the right of everyone "to seek and to enjoy in other countries asylum from persecution, except prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations".[4]

At the universal level the right to asylum is not imperative, since it has been laid down not in a treaty but in a recommendation, i.e. the text of the United Nations General Assembly resolution containing the Universal Declaration of Human Rights.[5] In some cases the right to asylum is included in treaties with obligatory force for the contracting parties. The American Convention on Human Rights (1969), for example, not only endows this principle with imperative treaty force but also goes further than the Universal

---

* Professor, Moscow State Institute of International Relations.

[1] Notes appear at the conclusion of this article.

Declaration: every person under the Convention has the right to be granted asylum.[6]

(*b*) The right of an individual to the protection of his/her Government is so important for a person's well-being that the absence of such protection has been considered in a number of international treaties the sole qualifying element for refugee status.[7] Refugee law provides for the country of asylum to take upon itself the protection of the refugee. Scope for protective action has also been envisaged for international institutions. Under the Statute of the Office of the United Nations High Commissioner for Refugees (Annex, chap. I (1)) the High Commissioner "shall assume the function of providing international protection . . . to refugees . . .".

(*c*) Among concepts making up the substance of protection should be noted the common standard in the words of the Universal Declaration, i.e. a set of rights and prerogatives that in a refugee situation ensure the satisfaction of at least the basic needs of individuals and groups in this precarious situation.

2. Basic standards of treatment

The Executive Committee of the High Commissioner's Programme has laid down the following minimum basic standards of treatment for refugees whose situation in the country of asylum has not yet been regularized, including those in large-scale influx situations:[8]

(*a*) Asylum seekers should not be penalized solely on the ground that their presence in the country is considered unlawful; they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order; they should enjoy the fundamental civil rights set out in the Universal Declaration of Human Rights;

(*b*) All necessary assistance should be given to them and they should be provided with the basic necessities of life including food, shelter and basic sanitary and health facilities;

(*c*) Those seeking asylum should be treated as persons whose tragic plight requires special understanding and sympathy and they should not be subjected to cruel, inhuman or degrading treatment;

(*d*) There should be no discrimination on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity. Asylum seekers should enjoy free access to courts of law and other competent administrative authorities;

(*e*) The location of asylum seekers should be determined by their safety and well-being as well as by the security needs of the receiving State. Asylum seekers should, as far as possible, be located at a reasonable distance from the frontier of their country of origin. They should not become involved in subversive activities against their country of origin or any other State;

(*f*) Family unity should be respected; all possible assistance should be given for the tracing of relatives, adequate provisions should be made for the protection of minors and unaccompanied children;

(*g*) Asylum seekers should be granted all the necessary facilities to enable them to obtain a satisfactory durable solution; they should be permitted to transfer assets which they have brought into a territory to the country where the durable solution is obtained;

(*h*) All steps should be taken to facilitate voluntary repatriation.

The guiding principle with regard to the standard of treatment of refugees is to accord to them the same treatment as to aliens generally, except where treaty clauses or national legislation contain more favourable provisions (art. 7.I. of the 1951 Convention, relating to the Status of Refugees). The more favourable treaty provisions include envisaging granting to the refugee treatment "as to aliens generally in the same circumstances"[9] (movable and immovable property, self-employment, liberal professions, housing, education other than elementary education, the choice of the place of residence and freedom of movement); "the most favourable treatment accorded to nationals of a foreign country, in the same circumstances" (the right of association, wage earning employment); and as to "nationals of the country of asylum" (religion, artistic rights and industrial property, matters pertaining to access to the courts, rationing, elementary education, public relief, remuneration, family allowances, hours of work, overtime arrangements, holidays with pay, minimum age of employment, training, the work of women and young persons, the enjoyment of the benefits of collective bargaining and, within certain limitations, social security). No duties, charges or taxes may be imposed upon refugees other or higher than those which are levied on nationals in similar circumstances

3. Rights under the Convention

An essential aspect of the protection of refugees is the rights granted to them directly by the 1951 Convention without reference to an analogous status of nationals or aliens. These concern such matters as the recognition of previously acquired rights especially in matters of marriage, free access to the courts of law in the territory of all contracting States, administrative assistance of the authorities of the State of residence or of international authorities, the issuing of identity papers and travel documents, and the transfer of assets. When a decision is being made with regard to expulsion on grounds of national security or public order, the refugee lawfully in the territory of the State of asylum must be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a competent authority. A refugee with regard to whom an expulsion decision has been taken shall be allowed a reasonable period within which to seek legal admission into another country. The right not to be returned to the country where his life or freedom would be threatened also belongs to this group of refugee rights.

Since discrimination on the grounds of race, religion, nationality, membership of a particular social group or political opinion is a major cause of the refugee movements, it is imperative that international conventions devoted to asylum should prohibit discrimination. And so they do: article 3 of the 1951 Convention requires States to apply the instrument without discrimination as to race, religion or country of origin. UNHCR, however, proceeds from wider notions of non-discrimination, which also include political opinion, nationality and physical incapacity.[10] This enumeration falls short of the standard laid down in article 2 of the Universal Declaration, at least on the criteria of sex and language, but exceeds the latter by the physical incapacity element.

Another relevant non-discrimination requirement is contained in article 73 of Additional Protocol I (1977) to the Geneva Conventions of 1949 relating to the protection of victims of international armed conflict, which provides that refugees shall be granted treatment not less favourable than the treatment accorded to nationals.

Refugees are entitled, in some instances, to favourable treatment, assistance and facilities, all important aspects of the principle of protection.

Favourable treatment means allowing refugees to enjoy rights with regard to the practice of religion, length of residence, ownership of property, right of association, employment, exercise of liberal professions, housing and public education.

Exemptions from exceptional measures are also based on the favourable attitude towards refugees on the part of the country of asylum.

Rights granted to refugees over and above those enjoyed by aliens generally are preserved by the Conventions.

Direct assistance to refugees on the part of the authorities of the country of asylum or of UNHCR and other international agencies in certain administrative matters is also provided for.

UNHCR in particular is empowered by its statute to facilitate the voluntary repatriation of refugees.[11]

In keeping with the provision of the Universal Declaration concerning the right of everyone to recognition everywhere as a person before the law,[12] the 1951 Convention establishes that any refugee in the territory of a State and who does not possess a valid travel document shall be issued identity papers. In so doing, the Convention reflects the principle that the possession of documentation is an essential requirement for the unhindered enjoyment of refugee rights. The possession of a travel document permits the enjoyment by refugees of the universal right to leave any country, as laid down in the Universal Declaration.[13] A refugee should not be required to return to the country issuing his conventional travel document for an extension of its validity or for its renewal; this should be effected by or through diplomatic or consular representatives of the issuing State. States should extend the validity of or renew refugee travel documents until the refugee has taken up lawful residence in the territory of another State. These guidelines on identity documents were laid down in 1984 by the UNHCR Executive Committee's Sub-Committee on International Protection.[14]

Nothing in international conventions prevents a State from granting rights and benefits apart from those established therein.

4. The principle of humanity

The moral and legal foundation for the whole range of international refugee law is without doubt the principle of humanity, which is directed at preventing and alleviating human suffering.[15] The case of refugees demonstrates suffering of a most acute form. The refugee suffers from the fear of being persecuted, in his own country, for reasons of his race, religion, nationality, membership of a particular social group or political opinion. His fear is sufficient to cause him to renounce the protection of the country of his nationality or not to return to the country of his habitual residence, and constitutes the basis of the status of refugee. The element of human suffering is also discernible in such situations as external aggression, occupation, foreign domination and events seriously disturbing public order, recognized as valid grounds for seeking asylum by the OAU Convention.[16]

Liberating a human being from the painful anxiety caused by the possibility of persecution in his country by giving him asylum elsewhere is to take another step in the realization of a human right, proclaimed in the Universal Declaration, that of freedom from fear.

The principle of humanity influences all aspects of international concern for refugees and imbues it with such requirements as impartiality and neutrality.

The notion of impartiality presupposes that no discrimination may take place in the exercise of protective functions with regard to refugees as to nationality, race, religious belief, class or political opinions. One of the main purposes of protection is to relieve the suffering of the individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

In order to enjoy the confidence of all, international humanitarian action may not take sides or engage at any time in controversies of a political, racial, religious or ideological nature. Thus can one describe the principle of neutrality.[17]

These aspects of protection are reflected in the Statute of the Office of the United Nations High Commissioner for Refugees, which requires that the work of the High Commissioner "shall be of an entirely non-political character".

Among the finest creations of the spirit of humanity to be found in international treaties and one which is steadily becoming a peremptory norm of international law is the principle of non-refoulement, by which States undertake not to expel or return a refugee to territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a social group or political opinion. This principle is to be applied irrespective of whether individuals have been formally recognized as refugees.

This is one of the most resolute obligations in international refugee law and departures therefrom are invariably of grave concern to the international community.

The principle of non-refoulement remains valid even in situations of large-scale influx of asylum-seekers. The Declaration on territorial asylum, admitting exceptions to the principle, recommends that refugees should be given an opportunity, whether by way of provisional asylum or otherwise, of going to another State.[18]

Universal principles governing the treatment of refugees is hardly possible without admitting existence of the principle of personality. Since all human beings are, to use the language of the Universal Declaration of Human Rights, "endowed with reason and conscience", expressions of the will of refugees are attributed with legal consequences in international treaties concerning asylum-seekers. Actually, the whole concept of refugees status mainly arises due to the fact that a person who finds himself outside the country of this nationality or habitual residence is unwilling to avail himself of the protection of that country or to return to it.

The identification of the country responsible for examining an asylum request is based on the intention of the asylum-seeker or on a connection or close links which he might have with a State. Asylum should not be refused solely on the ground that it could be sought from another State[19]

The previous conduct of an asylum-seeker may influence the decision concerning his refugee status, to the point of automatically excluding him from the coverage of international conventions. Such is the case if he has committed a crime against peace, a war crime or a crime against humanity, or a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee, or has been guilty of acts contrary to the purposes and principles of the United Nations.

The benefit of the principle of non-refoulement likewise may not be claimed by a refugee who on reasonable grounds is regarded as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.[20] Serious offences such as the unlawful seizure of aircraft, the taking of hostages and murder can result in extradition of the individual.[21]

The rights accorded to refugees depend upon the desire of the individual to use them. If the refugee chooses to prolong his period of residence in the country of asylum, he becomes entitled to exemptions from legislative reciprocity or from restrictions on employment of aliens. "Everyone has duties to the community" says the Universal Declaration. Refugees are obviously no exception. The 1951 Convention stresses that every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

This strict requirement is moderated by the realities of the situation and the favourable attitude of the State of asylum towards the refugee. For instance, if a refugee fleeing a territory where his life or freedom were threatened enters the country of asylum illegally, no penalties may be imposed on that account provided he presents himself without delay to the authorities and shows good cause for his illegal entry or presence. A person is largely free to terminate his or her refugee status. This is the case if he has voluntarily re-availed himself of the protection of the country of his nationality, has voluntarily re-acquired his lost nationality, enjoys the protection of the country of his newly acquired nationality, or has voluntarily re-established himself in the country which he left.

Although the notion of family reunification does not appear in the 1951 Convention, the respect by the State of asylum of rights attaching to marriage, required by art. 12, implicitly acknowledges this basic condition for the existence of a family which, as the natural and fundamental unit of society, is "entitled to protection by society and the State" according to the Universal Declaration.[22]

The UNHCR Sub-Committee on International Protection characterized family unity as the fundamental principle. Given the recognized right of everyone to leave any country, including his own, countries of origin should facilitate reunification by granting exit permission to family members of refugees to enable them to join the refugee abroad.

Family unity should also be respected in cases of large-scale influx of refugees. When deciding a family reunification case, the absence of documentary proof of the formal validity of a marriage or of the filiation of children should not *per se* be considered an impediment. States should facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted.[23]

During an international armed conflict States are required to facilitate in every possible way the reunion of families dispersed as a result of the armed conflict and to encourage in particular the work of the humanitarian organizations engaged in this task, in accordance with the provisions of the Geneva Conventions of 1949 and Additional Protocol I and in conformity with their respective security regulations.

5. International nature of the refugee problem

A fundamental feature of the refugee phenomenon in most of its manifestations is its inherently international nature. For responses to be adequate, solutions to the refugee problem have to be international as well. The preamble to the 1951 Convention acknowledges that the grant of asylum may place unduly heavy burdens on certain countries and that therefore the satisfactory solution of refugee problems "cannot . . . be achieved without international co-operation".

According to the United Nations Declaration on Territorial Asylum, the situation of refugees is of concern to the international community. This principle of internationalism manifests itself in individual and joint actions by States directly or through intergovernmental institutions.

Among the principal manifestations of joint actions, one of the most prominent is the creation of UNHCR as the principal United Nations agency with the competence to promote the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto. Through special agreements with Governments the High Commissioner executes measures calculated to improve the situation of refugees and to reduce the number requiring protection. She assists efforts to promote voluntary repatriation or assimilation within new national communities and promotes admission of refugees to the territories of States. Governments supply the High Commissioner with information concerning the number and condition of refugees in their territories and the laws and regulations concerning them, as well as information on the implementation of the Convention. The High Commissioner also maintains contacts with and facilitates the co-ordination of the efforts by private organizations dealing with refugee questions. The UNHCR Sub-Committee also recommended that UNHCR be permitted to participate in national procedures for determining refugee status. Asylum-seekers should be entitled to contact the UNHCR office, which is entitled to supervise their well-being in reception or other refugee centres.

The High Commissioner should also be recognized as having a legitimate concern for the consequences of the return of refugees to their country of origin, particularly where such return has been brought about as a result of an amnesty or other form of guarantee. Within the framework of close consultations with the State concerned, she should be given direct and unhindered access to returnees so as to be in a position to monitor fulfilment of the amnesties, guarantees or assurances on the basis of which the refugees have returned. This should be considered as inherent in the mandate.[23]

An important aspect of internationalism is the requirement, reflected in the United Nations Declaration on Territorial Asylum, that where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider appropriate measures to lighten the burden of that State.

Burden-sharing arrangements as an important manifestation of solidarity include, as necessary, emergency, financial and technical assistance, assistance in kind and advance pledging of further financial or other assistance beyond the emergency phase until durable solutions are found. Where voluntary repatriation or local settlement cannot be envisaged, asylum-seekers should be provided with resettlement possibilities in a cultural environment appropriate for their well-being.[23]

The respect of asylum granted by a State to persons entitled to invoke article 14 of the Universal Declaration of Human Rights by all other States[24] is another manifestation of international solidarity on the inter-State level.

Pursuant to provisions of the 1951 Convention, a refugee residing in one contracting State may exercise certain rights in another contracting State without a need for a new determination of his status, which would not be possible without the high degree of international co-operation achieved in this area.

6. The principle of State sovereignty

A cardinal dimension of refugee law is the notion of State sovereignty. It is the State which decides on whether the reasons given by the asylum-seeker are in conformity with internationally recognized norms for the grant of refugee status.[25]

The requirements for the determination of refugee status envisage the following:

The competent immigration or border police officer should have clear instructions for dealing with refugees on the basis of adherence to the principle of non-refoulement and should be required to refer refugee cases to a higher authority;

The applicant should receive guidance on procedures to be followed; he should be given the necessary facilities, including the services of an interpreter, for submission of his case to the authorities as well as permission to remain in the country pending a decision on the initial request;

When the applicant is recognized as a refugee, he should be so informed and issued with appropriate documentation. If the applicant is not recognized as a refugee, he should be given time to appeal for reconsideration of the decision. He should be permitted to remain in the country while the appeal is pending.[26]

National sovereignty requires that all persons, including refugees, conform to the laws and regulations of the country of asylum, as well as to the measures taken for the maintenance of public order.[27]

According to the 1951 Convention, in time of war or other grave and exceptional circumstances, a State may take provisional measures essential to national security in the case of a particular person, pending a determination by the contracting State that the person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

This provision should be read together with article 44 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, according to which in applying the measures of control the Power in whose jurisdiction protected persons find themselves shall not treat as enemy aliens, exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any Government. This applies to aliens in the territory of a party to an international armed conflict.

In the situation of belligerent occupation, article 70 of the Fourth Geneva Convention is operative. It states that protected persons (a notion which includes refugees) shall not be arrested, prosecuted or convicted by the occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

Nationals of the occupying Power who before the outbreak of hostilities sought refuge in the territory of the occupied State shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities or for offences under common law committed before the outbreak of hostilities, which, according to the law of the occupied State, would have justified extradition in time of peace.

These provisions testify to the fact that sovereign States do not have an unlimited choice of measures that they may apply to refugees. We would like to call it the principle of "enlightened sovereignty".

7. The principle of the rule of law

The principle of the rule of law is as important for the international protection of refugees as any of the leading legal provisions concerning their status.

In the light of international law, this principle manifests itself first and foremost in the fact that rights and duties in this area have been laid down mainly in international treaties which are updated periodically; and their application is supervised by mechanisms appropriate to this branch of international law. There exist or are in the process of formation certain essential rules of a customary nature in these matters.

On the national level the questions concerning the treatment of refugees invariably find their reflection in the legislation of different countries, including their constitutions. Rights and duties of protected persons and national authorities dealing with them are legal manifestations, and as such provide the necessary basis for the rule of law in the treatment of refugees at the State level.

The 1951 Convention provides, for instance, that the expulsion of a refugee on the grounds of national security or public order shall only be in pursuance of a decision reached in accordance with due process of law. As a rule, refugees must be allowed to submit evidence to clear themselves and to appeal to and be represented for the purpose before the competent authority or persons specially designated by the competent authority. This stipulation gives substantial effect to the requirement of the Universal Declaration of Human Rights to provide everyone with an effective remedy for acts violating the fundamental rights granted by the constitution or by law. In certain countries protection against the arbitrary expulsion of a refugee can be sought from a competent national tribunal.

8. Permanent solutions

The protection afforded to refugees by virtue of international conventions is to a large extent solution-oriented.

The Statute of UNHCR envisages two forms of permanent solution for the problem of refugees: voluntary repatriation or their assimilation within new national communities.

The granting of provisional asylum is a temporary solution to the refugee problem, to be met, for example, in situations of large-scale influx of refugees.

In order to facilitate the refugees' decision to repatriate, they should be provided with information on conditions in their country of origin; visits thereto by individuals or their representatives in order to inform themselves of the situation there should not automatically involve loss of refugee status.

Returning refugees should not be penalized for having left their country of origin, for reasons giving rise to refugee situations. If refugees have lost their nationality, on return it should be restored to them. UNHCR, with the agreement of the parties concerned, should be able to monitor the situation of returning refugees; projects for their reintegration in their country of origin should be established.[28]

9. Conclusion

When the circumstances in connection with which a person has been recognized as a refugee have ceased to exist, he can no longer continue to refuse to avail himself of the protection of the country of his nationality or to return to the country of his nationality or to return to the country of his former habitual residence. In such cases the 1951 Convention ceases to apply. By virtue of the same consideration the Convention does not apply to persons receiving protection or assistance from organs or agencies other than UNHCR.

The principles outlined above will undoubtedly be further reinforced and developed under the impact of international concern that the plight of refugees evokes.

Thus, the question of asylum-seekers whose status has not been determined, as well as that of the physical protection of refugees and asylum-seekers, have been qualified as lacunae in international refugee law. Efforts are under way to prepare the ground for filling these legal gaps. For example, the UNHCR Executive Committee has called for the elaboration of an international instrument concerning the treatment of refugee delinquents on the basis of national régimes. Further study is also required of the practice of temporary refuge, particularly in situations of large-scale influx of asylum-seekers.[28]

Efforts to endow the principle of non-refoulement with the character of a peremptory rule of international refugee law and of human rights law seem to have an increasing chance of being crowned with success.

NOTES

[1] Cf. the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)).

[2] See for example J. Pictet, *Development and Principles of International Humanitarian Law*, Martinus Nijhoff publisher, Dordrecht/Boston/Lancaster (Henri Dunant Institute, Geneva, 1985).

[3] See for example Principles concerning treatment of refugees, as adopted by the Asian-African Legal Consultative Committee at its Eighth Session, Bangkok, 1966, in *Collection of International Instruments concerning Refugees* (UNHCR, Geneva, 1979), pp. 201-206.

[4] Art. 14 of the Universal Declaration of Human Rights.

[5] Since, however, the Declaration is steadily moving into the domain of international customary law, the imperative aspect of the principle of asylum is constantly strengthened therewith (Declaration on Territorial Asylum, General Assembly resolution 2312 (XXII)).

[6] Art. 22.7 of the American Convention on Human Rights.

[7] See "Definitions of 'Refugee' according to Agreements, Conventions and Protocols mentioned in article 1 (A) (I) of the Geneva Convention of 28 July 1951", *Collection of International Instruments concerning Refugees* (UNHCR), pp. 45-47.

[8] "Conclusions on the International Protection of Refugees" adopted by the Executive Committee of the UNHCR Programme, UNHCR, Geneva, 1980 (HCR/IP/2/ENG/Rev.1989).

[9] The term "in the same circumstances" implies that any requirements which the particular individual would have to fulfil for the enjoyment of the right in question if he were not a refugee must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling (art. 6 of the 1951 Convention).

[10] See note 8.

[11] Statute of the Office of UNHCR, item 1 (General Assembly resolution 428 (V)).

[12] Art. 6 of the Universal Declaration of Human Rights.

[13] Art. 13 of the Universal Declaration of Human Rights.

[14] See note 8.

[15] Cf. "The Fundamental Principles of the Red Cross", *International Red Cross Handbook*, 12th edition, ICRC, LRCS, HDI, Geneva, 1983, pp. 1-2.

[16] Art. I.2 of the OAU Convention of 10 September 1969 governing the specific aspects of refugee problems in Africa.

[17] See note 15.

[18] Art. 3 of the United Nations Declaration on Territorial Asylum of 14 December 1967.

[19] See note 8.

[20] Arts. 1.F. and 33.2 of the 1951 Convention.

[21] See note 8.

[22] Art. 16.3 of the Universal Declaration of Human Rights.

[23] See note 8.

[24] Art. 1.1 of the United Nations Declaration on Territorial Asylum.

[25] Art. 1.3 of the United Nations Declaration on Territorial Asylum.

[26] See note 8.

[27] Art. 2 of the 1951 Convention.

[28] See note 8.

"Fear of persecution" and the law of human rights

*James C. Hathaway**

Is the international refugee definition's focus on the existence of a "well-founded fear of persecution" of continuing relevance in the post-cold war era?

The persecution standard evolved from the legitimate concern first stated in the 1938 Convention concerning the Status of Refugees coming from Germany[1] to exclude from protection those persons who were leaving their country for "reasons of purely personal convenience."[2] The Constitution of the International Refugee Organization (IRO)[3] rephrased this principle in positive terms and required the putative refugee to show "valid objections" to returning to his/her country of origin, which might include fear of persecution.[4] The modern Convention relating to the Status of Refugees, in turn, adopted the basic approach of the IRO precedent,[5] but made persecution the exclusive benchmark for international refugee status.[6]

While it is true that the persecution-based standard permitted the identification of the victims of nazism,[7] it also spoke to the ideology-charged atmosphere which dominated the thinking of the Western States that prepared the Convention.[8] The malleable persecution-based standard could be interpreted to embrace most of the emigrant dissidents from adversary States in the Eastern Bloc,[9] and would thus promote the immigration of Eastern Europeans to Western States then experiencing acute manpower shortages.[10] Moreover, because a finding that a refugee claimant faces the possibility of persecution implies censure of the State of origin, each recognition of refugee status would simultaneously support efforts to stigmatize as injurious the political systems in the communist countries of origin.[11]

Our continuing reliance[12] on the persecution-based standard in an age when refugee States of origin and destination are frequently politically compatible has compromised the ability of refugee law to afford broadly based protection.[13] In contrast to the cold war assumption of valid reasons for departure, refugee recognition today may be denied for reasons of foreign policy,[14] or at least be conditioned by an unspoken view that an allied State is unlikely to act in a persecutory way. As Göran Melander has noted, "rather than expose itself to the disapproval of the country of origin, a Government may deny a person the status of refugee."[15] Absent the political will to broaden the conceptual scope of the Convention, the challenge is to recast the notion of "persecution" in a manner which is consonant with modern political realities, and which genuinely enables Governments to conceive of refugee protection as a humanitarian act which ought not be a cause of tension between States.[16]

---

* Dr. Hathaway is Associate Dean of the Osgoode Hall Law School of York University, Toronto. This essay is an extract from his recently published book, *The Law of Refugee Status* (Butterworths Co., 1991).

[1] Notes appear at the conclusion of this article.

Persecution as the sustained or systemic violation of basic human rights resulting from a failure of State protection

It is generally acknowledged that the drafters of the Convention intentionally left the meaning of "persecution" undefined[17] because they realized the impossibility of enumerating in advance all of the forms of maltreatment which might legitimately entitle persons to benefit from the protection of a foreign State.[18] Bits and pieces of insight into the intended meaning of "persecution" can none the less be gleaned from the Convention's drafting history.

First, the drafters clearly viewed persecution as a sufficiently inclusive concept to capture the spectrum of phenomena which had induced involuntary migration during and immediately after the Second World War, ranging from the deprivation of life and liberty inflicted by the Nazis,[19] to the ideological conformism imposed by the communist States.[20] From the beginning, there was no monolithic or absolute conceptual standard of wrongfulness, the implication being that a variety of measures in disregard of human dignity[21] might constitute persecution. Refugee status was premised on the risk of serious harm,[22] but not on the possibility of consequences of life or death proportions.[23] In addition to the Convention's acceptance of deprivation of basic civil and political freedoms as sufficient cause for international concern, serious social and economic consequences were also acknowledged to be within the purview of persecution.[24]

Second, the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a State to its own population.[25] As a holistic reading of the refugee definition demonstrates, the drafters were not concerned to respond to certain forms of harm, *per se*, but were rather motivated to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection.[26] The existence of past or anticipated suffering alone, therefore, does not make one a refugee, unless the State has failed in relation to some duty to defend its citizenry against the particular form of harm anticipated.[27]

These basic tenets—a liberal sense of the types of past or anticipated harm which might warrant protection abroad,[28] and a fundamental preoccupation to identify forms of harm demonstrative of breach by a State of its basic obligations of protection—are of continuing relevance today. For persecution to remain a meaningful concept, it must be interpreted in the light of these principles as they apply in modern context.[29] As noted by the Council of Europe:

> . . . the concept of persecution should be interpreted and applied liberally and also adapted to the changed circumstances which may differ considerably from those existing when the Convention was originally adopted . . . account should be taken of the relation between refugee status and the denial of human rights as laid down in different international instruments.[30]

This approach will not eliminate the danger of political distortion inherent in the retention of the persecution standard,[31] but it may at least prevent the Convention from becoming a mere anachronism.

Drawing on these basic precepts, persecution may be defined as the sustained or systematic violation of basic human rights[32] demonstrative of a failure of State protection.[33] A well-founded fear of persecution exists when one reasonably anticipates that the failure to leave the country may result in a form of serious harm[34] which Government cannot or will not prevent,[35] including either "specific hostile acts or . . . an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear."[36] The balance of this essay examines the nature of basic human rights which constitute a State's duty of protection, the application of these standards in a number of specific contexts, and the circumstances in which a State may be said to have failed in its duty to ensure those basic human rights.

The nature of a State's duty of protection

It is axiomatic that we live in a highly imperfect world, and that hardship and even suffering remain very much a part of the human condition for perhaps the majority of humankind. It is also true that there is no universally accepted standard of quality of life, nor of the role that a Government should play in meeting the hopes and needs of its citizenry.[37] This plurality of experience and outlook restricts any attempt to define in absolute terms the nature of the duty of protection which a State owes to its people, as is clear from the deference that international law consistently pays to both cultural distinctiveness and sovereign autonomy.[38]

None the less, the international community has recognized that there are certain basic rights, including both freedom from interference and entitlement to resources, which all States are bound to respect as a minimum condition of legitimacy.[39] This recognition led to the adoption of common international standards of acceptable behaviour, which Governments have agreed to accept as limitations on claims of cultural heterogeneity and autonomy of action. While it is true that international law binds sovereign States only to the extent that they agree to be bound,[40] the breadth of the emerging international law of human rights is unquestionably impressive.

Among the myriad treaties, declarations, rules and other standards adopted by States, the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights,[41] the International Covenant on Civil and Political Rights (ICCPR),[42] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[43] is central. More than any other gauge, the International Bill of Human Rights is essential to an understanding of the minimum duty owed by a State to its nationals. Its place derives from the extraordinary consensus achieved on the soundness of its standards, its regular invocation by States, and its role as the progenitor for the many more specific human rights accords.[44] Reference to the International Bill of Human Rights in deciding whether or not a State has failed to provide basic protection in relation to core, universally recognized values is moreover consistent with the Convention's own Preamble and General Assembly resolution 2399 (XXIII).[45]

The use of a human rights standard for determining the existence of persecution is not accepted by all. The most conservative position, argued by Karl Zink, is that only a narrow subset of human rights violations can constitute persecution, namely deprivation of life[46] or physical freedom.[47] This position is often inappropriately tied to a narrow and literal reading of article 33 of the Convention, which prohibits the return of a refugee to "the frontiers of territories where his life or freedom would be threatened . . ."[48] Atle Grahl-Madsen adopts only a slightly more liberal view, arguing without explanation that the restriction or denial of such rights as freedom of thought, conscience and religion, freedom of opinion and expression, and freedom of peaceful assembly and association are outside the ambit of persecution.[49] The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systematic denial of core human rights is the appropriate standard.[50]

Of course, not all persons who have left their country because of anticipated risk to basic human rights are refugees. As noted in the introduction to this essay,[51] refugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming. Refugee law is therefore "substitute protection"[52] in the sense that it is a response to disfranchisement from the usual benefits of nationality.[53] As Guy Goodwin-Gill puts it, ". . . the degree of protection normally to be expected of the Government is either lacking or denied."[54]

This means that in addition to identifying the human rights potentially at risk in the country of origin, a decision on whether or not an individual faces a risk of "persecution" must also comprehend scrutiny of the State's ability and willingness effectively to respond to that risk. In so far as it is established that meaningful national protection is available to the claimant, a fear of persecution cannot be said to exist. This rule derives from the primary status accorded to the municipal relationship between an individual and his/her State,[55] and the principle that international human rights law is appropriately invoked only when a State will not or cannot comply with its classical duty to defend the interests of its citizenry.[56] Andrew Shacknove has helpfully phrased this principle in terms of a breakdown of the protection to be expected of the minimally legitimate State:

> Persecution is but one manifestation of the broader phenomenon: the absence of State protection of the citizen's basic needs. It is this absence of State protection which constitutes the full and complete negation of society and the basis of refugeehood.[57]

What rights are appropriately considered to be basic and inalienable, and thus capable of grounding a claim to refugee status? Within the International Bill of Human Rights, four distinct types of obligation exist. First are those rights which were stated in the Universal Declaration on Human Rights, translated into immediately binding form in the ICCPR,[58] and from which no derogation whatsoever is permitted, even in times of compelling national emergency.[59] These include freedom from arbitrary deprivation of life,[60] protection against torture or cruel, inhuman or degrading punishment or treatment,[61] freedom from slavery,[62] the prohibition of criminal prosecution for *ex post facto* offences,[63] the right to recognition as a person in law,[64] and freedom of thought, conscience and religion.[65] The failure to ensure these rights under any circumstances is thus appropriately considered to be tantamount to persecution.

Second are those rights enunciated in the UDHR and concretized in binding and enforceable form in the ICCPR, but from which States may derogate during a "public emergency which threatens the life of the nation and the existence of which is officially proclaimed."[66] These include freedom from arbitrary arrest or detention;[67] The right to equal protection for all,[68] including children[69] and minorities;[70] the right in criminal proceedings to a fair and public hearing and to be presumed innocent unless guilt is proved;[71] the protection of personal and family privacy and integrity;[72] the right to internal movement and choice of residence;[73] the freedom to leave and return to one's country;[74] liberty of opinion, expression, assembly and association;[75] the right to form and join trade unions;[76] and the ability to par-take in government,[77] access public employment without discrimination,[78] and vote in periodic and genuine elections.[79] The failure to ensure any of these rights will generally constitute a violation of a State's basic duty of protection, unless it is demonstrated that the Government's derogation was strictly required by the exigencies of a real emergency situation, was not inconsistent with other aspects of international law and was not applied in a discriminatory way.[80] Where, for example, the failure to respect a basic right in this category goes beyond that which is strictly required to respond to the emergency (in terms of scope or duration), or where the derogation impacts disproportionately on certain sub-groups of the population, a finding of persecution is warranted.[81]

Third are those rights contained in the UDHR and carried forward in the International Covenant on Economic, Social and Cultural Rights (ICESCR). In contrast to the ICCPR, the ICESCR does not impose absolute and immediately binding standards of attainment, but rather requires States to take steps to the maximum of their available resources progressively to realize rights[82] in a non-discriminatory way.[83] The basic values protected are the right to work,[84] including just and favourable conditions of employment, remuneration and rest;[85] entitlement to food,[86] clothing,[87] housing,[88] medical care,[89] social security[90] and basic education;[91] protection of the family, particularly children and mothers;[92] and the freedom to engage in and benefit from cultural, scientific, literary and artistic expression.[93] While the standard of protection is less absolute than that which applies to the first two categories of right, a State is in breach of its basic obligations where it either ignores these interests notwithstanding the fiscal ability to respond,[94] or where it excludes a minority of its population from their enjoyment.[95] Moreover, the deprivation of certain of the socio-economic rights, such as the ability to earn a living, or the entitlement to food, shelter or health care will at an extreme level be tantamount to the deprivation of life or cruel, inhuman or degrading treatment,[96] and hence unquestionably constitute persecution.

Fourth, a few of the rights recognized in the UDHR were not codified in either of the binding international covenants on human rights, and may thus be outside the scope of a State's basic duty of protection. The right to own and be free from arbitrary deprivation of property[97] and the right to be protected against unemployment[98] are examples of rights which are included in this group, and which will not ordinarily suffice in and of themselves as the foundation for a claim of failure of State protection.

In sum, persecution is most appropriately defined as the sustained or systematic failure of State protection in relation to one of the core entitlements which has been recognized by the international community.[99] The types of harm to be protected against include the breach of any right within the first category, a discriminatory or non-emergency abrogation of a right within the second category, or the failure to implement a right within the third category which is either discriminatory or not grounded in the absolute lack of resources. The balance of this essay examines the application of this general principle in specific contexts, drawing on Canadian case-law as a means of illustrating the viability of a human rights model for the conceptualization of a "fear of persecution."

Risk to civil and political rights

Under the human rights paradigm, the serious possibility of a violation of a first category right will always constitute a risk of persecution. Thus, the threat of execution,[100] assault,[101] torture,[102] slavery or enforced conformity of belief[103] exemplifies failure by the State to protect core values.[104] As was cogently noted in the decision of *Philomene Lundy*:[105]

> . . . Nothing can justify the use of violence against persons, for the purpose either of exercising or of retaining power. Oppression by all those who abuse their power will always be unacceptable and reprehensible, especially where the power is maintained by force . . .[106]

Similarly, the real risk of a human rights violation of the second category—arbitrary arrest or detention,[107] denial of freedom of movement,[108] opinion, association or privacy[109] for example—is usually to be equated with persecution. The only exception is short-term,[110] emergency derogation of a non-discriminatory nature from a second category right, which under international law is insufficient to establish the absence of State protection. In general, Canadian courts have recognized the need to view any sustained attack on one's physical, moral or intellectual integrity as probative of persecution.[111] As stated in the decision of *Charles Kwado Amoah*:[112]

> . . . it is not necessary for an individual to be beaten or tortured for him to have a feeling of persecution. It is sufficient if his fundamental freedom, his feelings of membership in a particular social group or the expression of his opinions are threatened for a well-founded fear to arise in him.[113]

Three types of confusion exist in relation to the application of the human rights framework in the context of threats to life or freedom. On the one hand, theorists such as Paul Weis have taken an overly inclusive position, arguing that "a threat to life or freedom . . . will always be persecution . . ."[114] This view overlooks the possibility of a constrained, non-discriminatory[115] abrogation of human rights of the second category during an emergency situation, such as the imposition of temporary restrictions on freedom of assembly or internal movement. As discussed above,[116] such a short-term suspension of rights may not be demonstrative of a failure of State protection, in which case it will not suffice as the basis for establishing a fear of persecution.

Secondly and conversely, a number of Canadian decisions have failed to recognize the rule that a threat to life or freedom is generally to be equated with persecution. In *Romilio Dictmart Aranda Diaz*,[117] for example, the Immigration Appeal Board dismissed a Chilean claim in which military personnel invaded the applicant's home and treated his family roughly, causing the claimant's wife to miscarry. This action, coupled with subsequent regular police visits and interrogations, was adjudged insufficient to establish refugee status. Fellow Chilean *Hector Eduardo Contreras Guttierez*[118] fared no better. Even though he had been badly beaten and tortured on several occasions during unlawful detentions, the Board characterized the incidents as merely part of "massive security measures",[119] and noted that the claimant "... was not disabled in any way in the alleged beatings and torture he received and admitted there were no scars"![120] A third example is the decision in *Raman Kumar Chopra*,[121] an Indian claimant who was twice beaten by police in addition to imprisonment and regular police harassment, but who in the Board's view was not persecuted. These cases illustrate a discomforting tendency to demand proof of impending harm substantially in excess of the limits established by international human rights norms.[122]

Thirdly, the Immigration Appeal Board has on occasion inappropriately dismissed claims of risk to civil and political rights because they were grounded in the advocacy of socio-economic welfare. For example, in *Meril Meryse*,[123] the risk of imprisonment or torture faced by the claimant in consequence of his lobbying for economic reform in Haiti was dismissed as merely a desire for "economic betterment";[124] evidence of possible military harassment of a Ghanaian because of his membership in a pressure group demanding better economic conditions led to a negative finding because "his protests were directed against economic rather than political considerations";[125] and fear of assault due to the claimant's withdrawal from "a vicious system of political patronage" in Guyana was deemed to raise economic concerns outside the scope of the refugee definition.[126] These judgements fail to focus on the central concern of risk to physical, moral or intellectual integrity, and demonstrate an unhealthy predisposition to question the possibility of a need for protection where socio-economic issues are involved. To be preferred is the type of reasoning found in the decision of *Grimaldo Remigio Corcuera Guzman*,[127] involving a Peruvian claimant who was detained for organizing political demonstrations in support of the rights of the poor. The Immigration Appeal Board found the applicant to be "... in a category of persons subject to harassment in the form of attacks on his basic rights"[128] and determined him to be a Convention refugee.

Critics argue that the relative ease of establishing a risk of persecution on the basis of a threat to life or freedom privileges these aspects of human dignity in relation to social, economic and cultural rights.[129] This observation, while correct, accurately reflects the current hierarchical state of the international law of human rights.[130] Rather than downgrading the seriousness with which we view risks to civil and political liberties, however, the more constructive direction for reform would seem to be the broadening of our perspective on those socio-economic rights which, like issues of life and freedom, ought reasonably to be considered central to a State's basic duty of protection.

Risk to economic, social and cultural rights

Just as the serious risk of violation of civil and political liberties indicates a lack of State protection, so too does failure to respect social, economic and cultural rights. This position is often misunderstood to imply that everyone who is poor, or who leads a life with few material advantages, can successfully advance a claim to refugee status. For example, Scott Burke has challenged the propriety of refugee claims grounded in the denial of socio-economic rights on the basis that "... hundreds of millions of people, including the entire third world ... suffer the deprivation of the 'rights' set forth in the [International] Covenant [on Economic, Social and Cultural Rights],"[131] thus implying a right to asylum "for anyone from an economically backward society."[132] Kenneth Brill has pointedly observed that "one of the main reasons for not expanding the refugee definition to encompass others besides political persecutees is that this would open the floodgates to the kind of economic migrants that our immigration system has sought to exclude."[133] These characterizations demonstrate a fundamental misperception of the nature of economic, social and cultural human rights.

Unlike the ICCPR,[134] the International Covenant on Economic, Social and Cultural Rights[135] does not create obligations that States are required to fulfil immediately upon accession. Rather, the duty of each State party is simply "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized",[136] and to "guarantee that the rights enunciated ... will be exercised without discrimination of any kind ..."[137] Thus, the Covenant creates two kinds of duty. First, a Government must marshal national and international resources,[138] and give priority to the expenditure of those resources in achieving the full realization of human rights.[139] Secondly, and more commonly related to refugee claims, States must implement socio-economic rights on a non-discriminatory basis, and may not, for example, limit basic educational opportunities to members of certain minority groups, or deny the right to work to members of an opposition political party. It must be emphasized, however, that the persistence of non-discriminatory poverty or hardship does not constitute *per se* a violation of the Covenant.[140]

In addition to this carefully circumscribed duty, the substantive scope of most socio-economic rights is far from a guarantee of prosperity for all. By way of example, the mandatory scope of the right to health only obliges States to work to reduce infant mortality, improve hygiene, control diseases and establish basic medical services.[141] Similarly, the right to education requires universal access only to primary education, with further opportunities conditioned by circumstances.[142]

Taken together, these carefully crafted qualifications within the ICESCR mean that an absence of State protection can be said to exist only where a Government fails to ensure the non-discriminatory allocation of available resources to meet the most basic of socio-economic needs. It is in this context that refugee protection becomes relevant—not as a means of guaranteeing access to "the good life", but rather only to vindicate the right of everyone to those social, economic and cultural attributes which are essential to human dignity.

Persecution distinguished from hardship

A line is therefore drawn between migration for reasons of "personal convenience"[143] or in search of improved living conditions, and migration driven by fear of a human rights violation tantamount to persecution. Because economic hardship is not necessarily a contravention of human rights norms, it is correct to exclude from refugee protection persons whose sole motivation for migration is the desire to leave generalized, difficult economic conditions, or who only wish the opportunity to build a more economically secure life.[144] Such persons are economic migrants, not refugees:

> The apprehension or calculation of the hardships which may be the lot of an entire group of people; and the reasonable desire to improve one's condition in life, either psychologically, socially or morally, are not sufficient . . .[145]

This principle is, however, subject to two major qualifications.

First, economic deprivation which is discriminatory in the sense of being directed against or experienced only by a minority within a State can be demonstrative of persecution. As discussed in more detail in the next section, it is clear that where economic suffering has a political, racial, or otherwise disfranchising impact, its victims may qualify as refugees.[146] As noted by Michael Schulteis:[147]

> . . . economic depression or persecution may also find expression in poverty, both absolute and relative, but they are a consequence of the system itself. For example, in some developing countries political and economic policies marginalize and impoverish local populations by depriving them of economic resources and political voice.[148]

In circumstances of this sort, where serious economic hardship is specific in its oppressive impact, a violation of human rights in the nature of persecution is established.[149]

The second qualification relates to persons who have a genuine fear of persecution, but who may *also* wish to improve their economic position or live in a country which enjoys conditions of prosperity. They need to leave their own country because their basic human rights are genuinely at risk, but they choose to seek protection in a country of social or economic opportunity. While the Immigration Appeal Board has occasionally appeared determined to deny such claims,[150] the fact of this auxiliary motivation is quite irrelevant to the issue of refugee status, as was eloquently stated in the decision of *Guillermo Lautaro Díaz-Fuentes*:[151]

> A superficial examination of the appellant's testimony both at the special inquiry and at the appeal hearing might suggest that the appellant is seeking material security above all, and that he might be what is called . . . an "economic migrant". . . But we must not consider this testimony out of context; on the contrary, what we must find out is whether behind apparent personal and economic motives there exists a fear of persecution . . . The distinction between an economic migrant and a refugee is not always easy to establish, but what is important to keep in mind is that if a person is a refugee, the fact that he also is or may be an economic migrant does not deprive him of his status as a refugee.[152]

This position has been approved by the Federal Court of Appeal decision in *Abeba Teklehaimanot* v. *Immigration Appeal Board*,[153] in which Mr. Justice Pratte held that there is no incompatibility in law between refugee status and the desire to establish oneself as a permanent resident of Canada.

In sum, while the rule that economic migrants are to be distinguished from refugees is well recognized, care must be taken to ensure that both the victims of economic oppression and refugees who seek the assistance of States of relative economic prosperity are not excluded from protection.

Defining a breach of economic, social or cultural rights

Thus far the argument has been that persecution may result from breach of a core social, economic or cultural right; that socio-economic human rights are abrogated only where a State either neglects their realization in the face of adequate resources, or implements them in a discriminatory way; and that the existence of generalized hardship is neither a sufficient nor a disqualifying factor in defining the existence of socio-economic persecution. It remains, then, to examine in more detail the circumstances in which a threat to basic economic, social or cultural rights is tantamount to persecution.

First, purely financial grievances do not constitute persecution,[154] this principle being a subset of the rule that core principles of human rights do not include a right to private property.[155] The case of *Jose Salvador Ficciella Munizaga*[156] involved a wealthy pro-Allende Chilean businessman whose opportunities and patronage had evaporated after the *coup d'état*, leading him to claim that he was being economically punished by the new régime. The Board correctly observed that it would not ". . . look into all business transactions of the applicant in his native country and pronounce whether he has real financial grievances . . . [because] even if he has, it is not equivalent to persecution."[157] Similarly, a claim grounded solely on the actual or anticipated confiscation of property or damage to goods, without any attendant risk to personal security or basic livelihood, is not of sufficient gravity to warrant the granting of refugee status.

Secondly, and also incapable of establishing persecution, are circumstances in which the rights at risk are related to core entitlements, but the threat does not go to the heart of the right as elaborated in international law. For example, the Board regularly characterized as insufficient the concerns of non-communist East Europeans who were relegated to inferior accommodation and were denied access to the full range of food and other amenities available to adherents of the ruling party. These claims have been accurately assessed as raising the spectre of discrimination short of persecution.[158] Polish claimant *Helena Olearczyk*,[159] for example, had been a member of Solidarity, and refused to join the ruling Communist Party. The Board found that

> . . . indeed she has been the victim of some harassment. Her superiors exercised some control over her union activities and it is probable that she was denied promotions and employment benefits. However, this harassment cannot be considered persecution in the sense of the Convention.[160]

This judgement was affirmed on judicial review, the Federal Court of Appeal noting that it agreed with the Board's view "that the harassment described was not sufficiently serious to amount to persecution."[161] Because socio-economic rights are intentionally defined in international law in terms of minimally acceptable standards, not every instance of unfairness broadly related to an enumerated right will support a finding of persecution.[162] While, for example, the rights to food and shelter are among those recognized in the ICESCR,[163] it is only an "adequate standard of living"[164] that is guaranteed by law, not access to the full range of desirable commodities and services.

The third category includes those claims which evince a serious risk to core human rights, and hence justify a finding of fear of persecution. The classic example is economic proscription,[165] the fundamental breach of the right to work established by article 23 of the UDHR[166] and articles 6 and 7 of the ICESCR.[167] Even the most conservative theorists agree that the systematic denial of the right to earn one's living is a form of persecution,[168] which can coerce or abuse as effectively as imprisonment or torture.[169] This has been recognized by the Federal Court of Appeal in judgements such as *Luis Rene Amayo Encina* v. *Minister of Employment and Immigration*,[170] involving a Chilean socialist who was subjected to constant surveillance at work following the military coup, ultimately fired from his job, and blocked by a system of official clearances from obtaining other employment. The Federal Court found the claimant to be a Convention refugee, noting that ". . . over a period of years [he] suffered persecution from various sources at his place of work and, after his discharge therefrom, during his period of unemployment prior to coming to Canada, all as a result of his former political activities and beliefs."[171]

Traditionally, however, the economic proscription principle has been narrowly defined to focus on situations of total exclusion from remunerative employment. In the well known case of *Jan Piotr Kwiatkowsky*,[172] for example, the claimant alleged a fear of return to Poland on the basis, *inter alia*, that his religious beliefs and opposition to communism had resulted in his exclusion from career progress as a teacher. Noting that his dissident status had resulted only in demotion, and not in a denial of his right to work as a teacher, his complaint was characterized as discrimination falling short of persecution.[173] Conversely, forced submission to grossly inappropriate forms of work has been characterized as persecution, as noted in the decision in *Juan Alejandro Araya Heredio*:[174]

> The Convention does not define persecution . . . but it is quite certain that persecution does not consist solely in physical torture; an essential element of persecution is harassment, so much so that real persecution would be present in the case of a person who was denied all opportunity to work or even one who, in order to survive, was forced to accept work manifestly incompatible with his occupational training.[175]

The decision of the Federal Court of Appeal in *Aram Ovakimoglu* v. *Minister of Employment and Immigration*[176] has adopted this broad reading. The Court characterized the testimony of the Armenian Christian Turkish claimant as "uncontradicted evidence of harassment and persecution which cried out for further exploration"[177] by the Immigration Appeal Board, noting his ". . . difficulties in obtaining and in retaining his employment"[178] and indeed "the lack of possibility for his advancement either in the army or in civilian life."[179] This decision takes a holistic view of the substance of the right to work, including both the right to access employment and the right to "just and favourable conditions of work", established by articles 6 and 7 respectively of the Covenant.[180] Persecution may therefore be established where an individual is prevented from securing any employment, or where the only work which he/she is permitted to access is, for example, of an extremely dangerous nature or grossly out of keeping with his/her qualifications and experience.

A problem in applying the economic proscription doctrine can arise where it is difficult to distinguish with precision between the impact of the persecutory acts of the State and the effects of a generally depressed economy. Particularly in the case of refugees from less developed countries, the inability to obtain employment may be the combined result of a general scarcity of work and the efforts of the Government or its agent to ensure that whatever minimal opportunities may exist are denied to the refugee. In such circumstances, it is inappropriate to dismiss the claim, as the refugee has still been effectively disfranchised by the State. The fact that initial opportunities were limited is not pertinent to the issue of whether the claimant has been disadvantaged beyond the norm because of the Government's persecutory acts.

In contrast, the Immigration Appeal Board has sometimes refused such claims. In the case of *Pedro Ignacio Vera Jiménez*,[181] for example, the Board did not "find it credible that the *sole barrier to employment* for [the claimant] was his political involvement. High unemployment and his lack of work experience are major factors that cannot be discounted as reasons for his lack of success . . . (emphasis added)." In the decision of *Ghouse Mahmood Khan Arshad*,[182] the claim was dismissed because "the difficulty in finding work, in this particular case, may be attributable *just as much* to the economic situation in India as to discrimination by the party in power (emphasis added)." These decisions do not deny that State action was exerted to foreclose economic opportunities, but instead avoid the issue on the ground that conditions would have been difficult even without governmental interference. Such analysis misses the central issue of whether or not persecution occurred, and results in discrimination against claimants from economically depressed countries.

Forms of economic persecution not related to the right to work enjoy a more ambiguous position thus far in the Canadian jurisprudence. While the decision of the Immigration Appeal Board in *Luis Enrique Toha Seguel*[183] is vague authority for the proposition that the discriminatory denial of educational or health facilities is a form of persecution,[184] other decisions are less encouraging. In *Naresh Persaud Ramsarran*,[185] for example, evidence of racially differentiated access to basic school supplies and emergency hospital care in Guyana was characterized as "drastic discrimination",[186] but not persecution. Similarly, the case of *Urszula Grochowska*[187] portrayed Polish denial of schooling and medical insurance to Gypsies as "extensive discrimination. . . [which] does not constitute persecution within the meaning of the definition of a Convention refugee."[188] These precedents take an overly narrow view of the meaning of persecution, and warrant reconsideration in the light of the human rights paradigm set out above. More in keeping with a holistic notion of human rights is the decision in *Vidya Ajodhia*,[189] involving the State-condoned racially discriminatory allocation of basic foodstuffs in Guyana. In accepting the claim to refugee status of an Indo-Guyanese citizen, the Board noted:

> It may be argued that the unfair distribution of food to Indo-Guyanese is a situation of discrimination rather than persecution. However, in my opinion, the withholding of essential food on a daily basis is clearly indicative of persecution.[190]

The adoption of a human rights framework for analysing the central criterion of international refugee status not only offers the possibility of reinforcing the Convention's contemporary vitality, but equally important, may contribute to a more universal interpretation of the protection mandate. Refugee status, if it is to remain meaningful, must successfully cross cultural and political boundaries beyond the contemplation of the drafters of the Convention. International human rights law is a contextually appropriate means of re-interpreting the basic tenets of the Refugee Convention, thereby extending the protective reach of refugee law in a manner consonant with the realities of modern coerced migration.

NOTES

[1] League of Nations, *Treaty Series*, vol. 192, p. 59, No. 4461.

[2] G. Melander, ''The protection of refugees'', *Scandinavian Studies in Law* (1974), 18, 153, p. 159.

[3] General Assembly resolution 62 of 15 December 1946.

[4] The IRO also recognized as ''valid objections'' compelling family reasons arising out of prior persecution, infirmity or illness, and objections of a political nature: see note 3. In practice, IRO policy extended protection also to persons who feared discrimination: T. Cox, ''Well-founded fear of being persecuted: the sources and application of a criterion of refugee status'', *Brooklyn J. Intl. L.* (1984) 332, 10, p. 339.

[5] ''. . . [the] definition of the term 'refugee' referred to those who are victims of persecution 'as a result of events' in Europe prior to 1 January 1951. That phrase was derived from the Constitution of the International Refugee Organization, and had a recognized meaning which everyone understood'': Statement of Mr. Henkin of the U.S.A., United Nations doc. E/AC.7/SR.173, p. 5, 12 August 1950. See also Y. Shimada, ''The concept of the political refugee in international law'', *Japanese Ann. Intl. L.* (1975) 19, 24, p. 35.

[6] The narrowing of the grounds for protection was noted by the Director-General of the International Refugee Organization (IRO), who argued that the exclusive reliance on fear of persecution, ''. . . will exclude persons having IRO valid objections of [a] political nature and [who object to return] for compelling family reasons, thus militating against persons of undoubted political sincerity. . .'': Cable from the Director-General of the IRO, United Nations doc. E/AC.32/L.16, 30 January 1950. In the result, the Convention definition ''. . . clearly does not include everyone outside his or her country in a situation of distress and unable to return home'': P. Hyndman, ''The 1951 Convention definition of refugee: an appraisal with particular reference to the Sri Lankan Tamil claimants'', *Human Rts. Q.* (1987) 9, 49, p. 52.

[7] ''These instruments center on a definition of 'refugee' that was designed to secure the humanitarian objective of relieving the victims of Nazi persecutions'': J. Garvey, ''Toward a reformulation of international refugee law'', *Harvard Intl. L. J.* (1985), 26, 483, p. 483.

[8] K. Brill, ''The endless debate: refugee law and policy and the 1980 Refugee Act'', *Cleveland State L. R.* (1983) 32, 117, p. 137; G. Melander, *supra*, note 2, *op. cit.* p. 160: ''Owing to the Boycotting by the East European states of the organs of the United Nations, . . . the Refugee Convention [was] drafted by Western states only. It was quite natural to claim persecution in the country of origin. All the refugees emanated from East European states. Countries of asylum, i.e. Western states, were not obliged to take any political considerations into account. The relations between Eastern and Western states at that time could hardly have been worse.''

[9] It has been noted that the drafters ''wished to create an instrument for the protection of persons who had escaped from, or did not wish to return to, specific countries in which, in the common opinion of the Parties, conditions of persecution prevailed at the time the Convention was concluded'': C. Pompe, ''The Convention of 28 July 1951 and the International Protection of Refugees'' *Rechtsgeleerd Mag. Themis* (1956) 425, published in English as United Nations doc. HCR/INF/42, May 1958.

[10] ''In establishing a legal and organizational framework to deal with the refugee problem, the Western powers were not only guided by a humanitarian concern for Europe's refugees. For ideological reasons, they had to identify anyone who had moved from Eastern Europe as a victim of communist rule. For economic and political purposes, they had to facilitate the removal of many refugees from the shattered states of Western Europe to the labour-

hungry countries of the New World": International Commission on International Humanitarian Issues, *Refugees: The Dynamics of Displacement* (1986) 32.

[11] "Neither was the judgemental and polemical character of such a definition . . . seen as posing a serious problem, since it was the time of the cold war, when such an approach would serve, from the Western point of view, as a useful means of stigmatising the Communist régimes of Eastern Europe as persecutors": G. Coles, "Approaching the Refugee Problem Today", in G. Loescher and L. Monahan eds., *Refugees and International Relations* (1989) 374-375.

[12] "It could be argued that in practice the element of 'persecution' is no longer being regarded as an essential element in the definition of a 'refugee', and that while lip-service is still paid to this element, it is no longer considered by some States to be a *sine qua non* . . . However, this may be an over-simplification": G. Coles, "Background Paper for the Asian Working Group on the International Protection of Refugees and Displaced Persons" (1980, unpublished) 99.

[13] "The Convention definition has been described as ". . . a definition partly stripped of political feeling though not yet raised to the purely humanitarian and politically neutral level where protection is afforded to the legally unprotected human being as such": C. Pompe, *supra*, note 9, *loc. cit.*, p. 13; See generally J. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" *Harvard Intl. L. J.* (1990) 31 (1), 129.

[14] ". . . granting refugee status can be a delicate political matter. It can be seen as involving a comment upon the internal affairs of the country from which the person has fled, and to amount, in effect, to a statement that there may be reasons why people within the country who fled could fear persecution . . . Because of the negative imputation which this carries, and the possible detrimental effect upon the relationships existing between the country of refuge and that of origin, many States are hesitant to grant refugee status for considerations of a political nature": P. Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum" *Australian L. J.* (1986) 60, 148, p. 149.

[15] *Supra*, note 2, *op. cit.*, p. 159.

[16] "Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States . . .": Preamble to the Convention relating to the Status of Refugees, vol. 189, United Nations, *Treaty Series*, No. 2545, entered into force 22 April 1954.

[17] "The term 'persecution' has nowhere been defined and this was probably deliberate": P. Weis, "The concept of the refugee in international law" *J. de droit intl.* (1960) 87, 928, p. 970; A. Grahl-Madsen, *The Status of Refugees in International Law* (1966) 193: "It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; or in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men."

[18] See also C. Fong, "Some Legal Aspects of the Search for Admission into Other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats" *British Y.B. Intl. L.* (1981) 52, 53, p. 92.

[19] ". . . in no case could the victims of racial persecution be compelled to resume their former nationality or resettle in the countries where they had suffered so bitterly": Statement of Mr. Rochefort of France, 11 ESCOR 276 (406th mtg.), 11 August 1950.

[20] "As to refugees, both present and future, arriving in central and western Europe from eastern European lands, he considered that, having regard to the terms of the draft convention and the observations of the High Commissioner for Refugees, the non-governmental organizations need have no fear that such refugees would not be covered by the present text": Statement of Mr. Warren of the U.S.A., United Nations doc. A/CONF.2/SR.21, p. 15, 14 July 1951.

[21] "... what is persecution in the particular case is a question of fact. Other measures in disregard of human dignity might also constitute persecution": P. Weis, *supra*, note 17, *loc. cit.*, p. 970; Y. Shimada, *supra*, note 5, *loc. cit.*, p. 37; and M. Chemille-Gendreau, "Le concept de réfugié en droit international et ses limites", *Pluriel* (1981) 28, 3, p. 9.

[22] "The word persecution is generally taken to exclude individuals who face discrimination or maltreatment other than of a very serious kind": R. Plender, "Admission of Refugees: Draft Convention on Territorial Asylum" *San Diego L.R.* (1977) 15, 45, p. 53; K. Petrini, "Basing Asylum Claims on a Fear of Persecution Arising From a Prior Asylum Claim" *Notre Dame Lawyer* (1981) 56, 719, p. 723; and D. Gross, "The Right of Asylum Under United States Law" *Columbia L.R.* (1980) 80, 1125, p. 1136, who characterizes persecution as involving more than "minor disadvantage or trivial inconvenience."

[23] "Because persecution is a factual question, the official must have broad latitude in making the determination as to whether the person claiming the benefit is in fact persecuted. It is clear, however, that 'persecution' is not restricted solely to physical abuse or incarceration": A. Fragomen, "The Refugee: A Problem of Definition" *Case Western Reserve J. Intl. L.* (1970) 3, 45, p. 54.

[24] This point was established in an exchange between the representative of the American Federation of Labor and the delegate of France during the drafting of the Convention. Mr. Stolz of the AFL "... recalled that people sometimes left their country for social or economic reasons, an eventuality which was not specifically mentioned [in the Convention]." Mr. Rain of France replied that he "... thought that the nature of the persecution should be described in very broad terms. In actual practice he felt sure that the people referred to by the AF of L representative would be recognized as refugees": United Nations doc. E/AC.32/SR.17, pp. 3 and 4, 6 February 1950. Indeed, European determination authorities readily recognized such claims in the early years of the Convention's life: see A. Grahl-Madsen, *supra*, note 17, *op. cit.*, pp. 201-209.

[25] This concern is most clear in the early formulations of the generalized refugee definition. The British draft, for example, provided that the Convention would apply to "unprotected persons" (United Nations doc. E/AC.32/L.2, p. 1, 17 January 1950), while the French draft spoke of persons who were "unwilling or unable to claim the protection of [their] country" (United Nations doc. E/AC.32/L.3, p. 3, 17 January 1950). As finally agreed to, the Convention extends only to a person who is "... unable or ... unwilling to avail himself of the protection" of his or her country of origin: Convention, *supra*, note 16, art. 1 (A) (2).

[26] "This limitation on the definition of refugee owes its origin to the fact that the refugee is designated as a person who stands in need of international protection because he or she is deprived of that in his or her own country": R. Plender, *supra*, note 22, *op. cit.*, p. 54.

[27] "The concept of persecution is usually attached to acts or circumstances for which the government ... is responsible ... [and which] leave the victims virtually unprotected by the agencies of the State": C. Fong, *supra*, note 18, *op. cit.*, p. 92.

[28] "The term 'persecution', used in the Refugee Convention and Protocol as well as in the UNHCR Statute, has never been officially defined, but the drafters of the Convention clearly conceived it in a liberal way": A. Grahl-Madsen, "Identifying the World's Refugees" *Annals A.A.P.S.S.* (1983) 467, 11, p. 15.

[29] "Motives for leaving home countries and seeking asylum have changed from the standard persecution arguments of European refugees; motives have become increasingly complex and mixed, not always linked to persecution in the European sense": M. Chamberlain, *Fletcher Forum* (1983) 7, 93, p. 104.

[30] Cited in remarks by J. Thomas in A. Woods ed., "Refugees: A New Dimension in International Human Rights", ASILP (1976) 70, 58, p. 69.

[31] See text, *supra*, at note 12 ff.

[32] The Preamble to the Refugee Convention commences with a specific reference to the interrelationship between refugee protection and international human rights law: "The High

Contracting Parties, considering that the Charter of the United Nations and the Universal Declaration of Human Rights . . . have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination . . . Have agreed as follows": Convention, *supra*, note 16, preamble; S. Young, "Who is a Refugee? A Theory of Persecution" *In Defence of the Alien* (1982) 5, 38, 46: "But before the law can infer an intent at harassment, a standard of duty by which we measure the misfeasance or nonfeasance is necessary. Fortunately such a standard exists in the International Covenant . . ."

[33] ". . . the acts must be committed by the government (or the party) or organs at its disposal, or the behaviour must be tolerated by the government in such a way as to leave the victims virtually unprotected by the agencies of the State": C. Fong, *supra*, note 18, *op. cit.*, p. 92.

[34] ". . . persecution is also very much a question of degree and proportion, requiring relation of the general notion to commonly accepted principles of human rights": G. Goodwin-Gill, "Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the UNHCR" *Michigan Y.B. Intl. L. Studies* (1980) 291, p. 298.

[35] ". . . the intent necessary for a finding of persecution can be imputed to a government. Persecution would thus arise not only from a conscious intent to harm (malfeasance) but also from misfeasance or nonfeasance": S. Young, *supra*, note 32, *op. cit.*, p. 45; G. Goodwin-Gill, *supra*, *loc. cit.*, note 34, pp. 298-299, in which the author notes that persecution comprehends ". . . failure (voluntary or involuntary) on the part of the state authorities to prevent or suppress [private] violence."

[36] D. Anker and M. Posner, "The Forty Year Crisis: A Legislative History of the Refugee Act of 1980" *San Diego L.R.* (1981) 82, 1, p. 67.

[37] "The way of achieving [the] assault on injustice has to be through a scheme of obligations under international law. The particulars of this accountability, however, must be drafted differently for different societies. Each government's acts are to be evaluated in terms of the conditions of its society as determined by that society's preferred values and structures of social organization": S. Sinha, "Human Rights: A Non-Western Viewpoint" *Archiv für Rechts- und Sozialphilosophie* (1981) 67, 76, pp. 89-90.

[38] "No matter how much one may vilify state sovereignty, the argument that a supranational legal authority is viable, or latent, is a very difficult one to make. One must first establish, in the context of United Nations law for example, that Article 2 (7) of the Charter is invalid and no longer applies to human rights . . . this is no mean feat, involving as it does a wholesale redefinition of the sources of international obligation by substituting majority rule for state consent as the ultimate basis of legal validity in the system": J. Watson, "Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law" *U. Illinois L. Forum* (1979) 3, 609.

[39] ". . . the strict doctrine of national sovereignty has been cut down in two crucial respects. First, how a state treats its own subjects is now the legitimate concern of international law. Secondly, there is now a superior international standard, established by common consent, which may be used for judging the domestic laws and the actual conduct of sovereign states within their own territories and in the exercise of their internal jurisdictions, and may therefore be regarded as ranking in the hierarchy of laws even above national constitutions": P. Sieghart, *The International Law of Human Rights* (1983) 15.

[40] See note 38.

[41] General Assembly resolution 217 A (III) of 10 December 1948 (Universal Declaration of Human Rights). Article 14 of the UDHR provides for "the right to seek and enjoy in other countries asylum from persecution." In reliance on this provision, it may be argued that "the asylum provision assures that where a member state fails to abide by the [other UDHR-based] standards, the individual at risk will be able to find sanctuary in another member state": A. Helton, "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status" *Columbia Human Rts. L.R.* (1983) 15, 39, p. 56.

[42] General Assembly resolution 2200 (XXI) of 19 December 1966, entered into force 23 March 1976 (International Covenant on Civil and Political Rights).

[43] General Assembly resolution 2200 (XXI) of 19 December 1966, entered into force 3 January 1976 (International Covenant on Economic, Social and Cultural Rights).

[44] "The Universal Declaration not only reflects a consensus of world opinion on the nature of the fundamental rights and freedoms belonging to every individual, but also expresses a unanimity of belief in the principle that the inherent dignity and worth of the human person requires respect for and protection of that person's rights. Since its adoption, the Declaration has achieved an international status far beyond the early expectations of its drafters. The Declaration has been referred to in numerous international instruments, and it has been made directly or indirectly a part of the constitutions of a number of states . . . From an international law perspective, one is justified in maintaining that the Declaration, which technically has only the force of moral persuasion, has now become a part of customary international law and, thus, legally binding on all states": V. Saari and R. Higgins Cass, "The United Nations and the International Protection of Human Rights: A Legal Analysis and Interpretation" *California W. Intl. L.J.* (1977) 591, p. 597. The two Covenants on Human Rights, which carry the precepts of the Universal Declaration forward in detailed and binding form, have now been ratified by 92 (ICESCR) and 87 (ICCPR) States parties: J.-B. Marie, "International Instruments Relating to Human Rights: Classification and Chart Showing Ratifications as of 1 January 1989" *Human Rights L.J.* (1989) 10, pp. 111-112.

[45] The Preamble to the Convention invokes the Universal Declaration of Human Rights as the means by which States "have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination". As noted by the European Court of Human Rights in Golder *v.* United Kingdom *E.H.R.R.* (1975) 1, 524, para. 34, the preamble of an international convention may be used to determine its object and purpose. This principled approach to refugee determination was endorsed in General Assembly resolution 2399 (XXIII) of 6 December 1968, which called on States to treat "new refugee situations in accordance with the principles and spirit of the Declaration on Territorial Asylum and the Universal Declaration of Human Rights." P. Hyndman, *supra*, note 6, *op. cit.*, p. 61.

[46] This narrow view was advocated by the Swiss Government during the drafting of the Refugee Convention: "The Swiss Federal Government regarded as refugees all aliens whose lives are in danger for political reasons, and who, to escape that danger, were compelled to seek refuge in Switzerland": Statement of Mr. Schurch of Switzerland, United Nations doc. A/CONF.2/SR.20, p.13, 13 July, 1951.

[47] Zink interpreted persecution ". . . so as to mean only deprivation of life or of physical freedom. In the former category he includes enforced, protracted unemployment in the absence of other means of livelihood, but he excludes attacks on a person's physical integrity, unless such attacks may lead to the victim's death or implies loss of physical freedom": A. Grahl-Madsen, *supra*, note 17, *op. cit.*, p. 193.

[48] Convention, *supra*, note 16, art. 33 (1). Grahl-Madsen soundly refutes this view: "The quoted phrases were absolutely not conceived of as a more precise formulation of the concept of 'persecution.' It was apparently the intention of the *Ad Hoc* Committee that the words 'life and freedom' should be given a very broad interpretation . . . and that any kind of 'persecution' which may entitle a person to the status of Convention 'refugee' shall be considered a 'threat to life or freedom' in the sense of Articles 31 and 33. In other words, we may look to Article 1 in order to determine the scope of Articles 31 and 33, but not *vice versa*": A. Grahl-Madsen, *supra*, note 17, *op. cit.*, p. 196.

[49] A. Grahl-Madsen, *supra*, note 17, *op. cit.*, p. 195.

[50] "I see human rights as the principal indices of human well-being, the recognition of which has been considered by the international community as the foundation of freedom, justice and peace . . . Accordingly, the refugee problem, as any other political problem, should be approached from the perspective of human rights in order to determine the basic legal and moral nature of the problem and of the solution required": G. Coles, "The Human Rights Ap-

proach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry", in A. Nash, ed., *Human Rights and the Protection of Refugees under International Law* (1988) 196; J. Vernant, *The Refugee in the Post-War World* (1953) 8, G. Melander, *Eligibility Procedures in Western European States* (1976) 7, G. Goodwin-Gill, *The Refugee in International Law* (1983) 38, and A. Ghoshal and T. Crowley, "Refugees and Immigrants: A Human Rights Dilemma" *5 Human Rts. Q.* (1983) 327, p. 329.

[51] See notes 25 and 26.

[52] J. Patrnogic, "Refugees—A Continuing Challenge" *Annuaire de droit international medical* (1982) 73, p. 75.

[53] Memorandum from the Secretary-General, United Nations doc. E/AC.32/2, p. 13, 3 January 1950.

[54] G. Goodwin-Gill, "Non-Refoulement and the New Asylum Seekers" *Virginia J. Intl. L.* (1986) 26 (4), 897, p. 901.

[55] A. Grahl-Madsen, *supra*, note 17, *op. cit.*, pp. 97-101.

[56] "The general definition must be seen as a product of the legal and political philosophy of the 18th, 19th and early 20th centuries in the western countries. The major terms of this philosophy were the State and the Individual, and the respective rights and duties of the State and the Individual . . .": P. Hartling, "Concept and Definition of 'Refugee'—Legal and Humanitarian Aspects" (1979, unpublished).

[57] A. Schacknove, "Who is a Refugee?" *Ethics* (1985) 95, 274, p. 277.

[58] "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant": *supra*, note 42, ICCPR, art. 2 (1)-(2).

[59] "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant . . . [but] no derogation from arts. 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18 may be made under this provision": *ibid.*, art. 4 (1)-(2).

[60] *Ibid.*, art. 6.

[61] *Ibid.*, art. 7.

[62] *Ibid.*, art. 8.

[63] *Ibid.*, art. 15.

[64] *Ibid.*, art. 16.

[65] *Ibid.*, art. 18.

[66] *Ibid.*, art. 4 (1).

[67] *Ibid.*, arts. 9 and 10.

[68] *Ibid.*, arts. 3 and 26.

[69] *Ibid.*, art. 24.

[70] *Ibid.*, art. 27.

[71] *Ibid.*, art. 14.

[72] *Ibid.*, arts. 17 and 23.

[73] *Ibid.*, art. 12 (1).

[74] *Ibid.*, art. 12 (2)-(4).

[75] *Ibid.*, art. 19-22.

[76] *Ibid.*, art. 22.

[77] *Ibid.*, art. 25 (*a*).

[78] *Ibid.*, art. 25 (*c*).

[79] *Ibid.*, art. 25 (*b*).

[80] Permissible derogation is limited to acts which are "... strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [the State's] other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin": *ibid.*, art. 4(1). Moreover, emergency situations must be officially declared, and formal notice of derogation given to the Secretary-General of the United Nations: *ibid.*, art. 4(1)-(3).

[81] A group of experts in international law was convened by the International Commission of Jurists in 1984 to draft The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. The consensus achieved was intended to reflect the existing state of international law with respect to the scope of the limitation clauses, and the type of situations which qualify as public emergencies: United Nations doc. E/CN.4/1984/4, reproduced *I.C.J. Review* (1986) 36, 48.

[82] "Each State Party to the Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures": *supra*, note 43, ICESCR, art. 2 (1). This obligation has recently been interpreted to mean, *inter alia*, that States must, regardless of their level of development, ensure respect for minimum subsistence rights for all, and that in assessing the adequacy of measures undertaken, "attention shall be paid to equitable and effective use of and access to the available resources", including those available through international co-operation and assistance: *The Limburg Principles*, Principles 0.10-0.13, reported at *I.C.J. Review* (1986) 37, 43.

[83] "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status": *supra*, note 43, art. 2 (2).

[84] *Ibid.*, art. 6.

[85] *Ibid.*, art. 7.

[86] *Ibid.*, art. 11 (1).

[87] *Ibid.*

[88] *Ibid.*

[89] *Ibid.*, art. 12.

[90] *Ibid.*, art. 9.

[91] *Ibid.*, arts. 13 and 14.

[92] *Ibid.*, art. 10.

[93] *Ibid.*, art. 15.

[94] "... The available resources language should be read as establishing a priority for social welfare. Given the purposes of the Economic Covenant, it is hard to see how the alternative reading would make any sense. It is clear that the drafters of the Economic Covenant wished to impose obligations on states. Yet if the only obligation arising from the Economic Covenant was that a state could spend what it wanted on social welfare, then this would be no obligation at all and the drafters would have failed in their goal": D. Trubek, "Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs", in T. Meron ed., *Human Rights in International Law* (1984) 215.

[95] "Some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2 (2) of the Covenant": *The Limburg Principles*, *supra*, note 82, Principle 0.7.

[96] "To take a central example, that of the relationship between ICCPR 6 (1) and ICESCR 11 (1), the question is whether the 'right to life' can be interpreted to include a 'right to an adequate standard of living', various aspects of the latter right thus falling to be adjudicated in the name of the former. If sustainable, such an interpretation generates an implicit overlap between the two articles . . . ; C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" *Osgoode Hall L.J.* (1989) 27 (4), 769, p. 780.

[97] UDHR, *supra*, note 41, art. 17.

[98] *Ibid.*, art. 23.

[99] Accord M. Gibney and M. Stohl, "Human rights and U.S. Refugee Policy", *in* M. Gibney ed., *Open Borders? Closed Societies? The Ethical and Political Issues* (1988) 159: "Drawing the line on what is or is not persecution has been extremely difficult and politically charged. The position taken here is that there are different levels of persecution (and human rights violations) that are practised in the world, and such levels ought to be recognized in making refugee admission determinations."

[100] This includes the threat of execution directed against a broadly defined group. In Kidane Ghebreiyesus, the Immigration Appeal Board held in relation to an Eritrean from Ethiopia that ". . . a civil war directed against a minority race inside a country, verging on genocide, is without doubt evidence of racial persecution": Immigration Appeal Board Decision 79-1137, C.L.I.C. Notes 20.3, 21 March 1980, p. 3, per R. Tremblay; *Adan Jeronimo Alvarenga*, Immigration Appeal Board Decision M87-1081, 20 May 1987.

[101] The threat of rape, for example, is a sufficient basis to fear persecution, as is noted in the decision of María Veronica Rodríguez Salinas Araya, Immigration Appeal Board Decision 76-1127, 6 January 1977, p. 8, per J.-P. Houle: ". . . threats such as these are degrading and constitute quite clearly an attack on the moral integrity of the person and, hence, persecution of the most vile sort."; *Philomene Lundy*, Immigration Appeal Board Decision M87-1496X, 26 November 1987.

[102] ". . . the right of persons not to be subjected to torture or inhuman or degrading treatment may be considered a peremptory rule of customary international law": K. Hailbronner, "Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?" *Va. J. Intl. L.* (1986) 26 (4), 857, p. 887.

[103] Guy Goodwin-Gill has argued that, notwithstanding its non-derogable character, the denial of freedom of worship may be equated with persecution only in certain circumstances: see G. Goodwin-Gill, *supra*, note 34, *loc. cit.*, pp. 298-299.

[104] Persecution ". . . would encompass threats to life and liberty, so that execution, detention, and torture are readily included . . .": G. Goodwin-Gill, *supra*, note 34, *loc. cit.*, p. 298; I. Foighel, "Legal Status of the Boat People" *Nordisk Tidsskrift for Intl. Ret* (1979) 48, 217, p. 221; F. Marino-Menendez, "El concepto de refugiado en un contexto de derecho internacional general" *R. española del derecho internacional* (1983) 35 (2), 337, p. 354.

[105] Immigration Appeal Board Decision M87-1496X, 26 November 1987.

[106] *Ibid.*, p. 1, *per* J. Blumer.

[107] "The applicant stated under oath that on none of the occasions he was arrested and detained was he formally charged and he was never summoned for trial. This constitutes a serious infringement of basic human rights and such infringement is equivalent to persecution": *Jose Del Rosario Perez Gomez*, Immigration Appeal Board Decision M79-1179, 2 June 1980, p. 3, *per* J.-P. Houle; *Fernando Alejandro Cordova Seguel*, Immigration Appeal Board Decision 76-1157, 11 August 1977; *Jose Mariano Aquilar Vides*, Immigration Appeal Board Decision M83-1009, 3 February 1983. On the other hand, the Board inexplicably chose to ignore evidence of arbitrary detention in an Indian case involving repeated mass arrests conse-

quent to demonstrations of political opposition: *Harpal Singh Gill*, Immigration Appeal Board Decision T83-10185, 12 December 1983.

[108] This would include mass expulsions of minority groups, ". . . when the expelled minority is hostile to the belief system of the dominant group": G. Beyer, "The Political Refugee: 35 Years Later" *Intl. Migration R.* (1981) 15, 26, p. 26.

[109] In the case of Noe Aguilar Martinez, it was decided that the illicit search of the family home on six occasions, in tandem with repeated questioning of the wife about her husband's whereabouts was "tantamount to persecution": Immigration Appeal Board Decision M80-1145, 20 November 1980, p. 4, *per* J.-P. Houle.

[110] Grahl-Madsen, for example, draws an arbitrary standard for determining when emergency detention is of sufficient duration to amount to persecution: "When it comes to threats to freedom, it is to be hoped that my old conclusion still holds good: that imprisonment or detention for a period of three months or more constitutes persecution": A. Grahl-Madsen, "International Refugee Law Today and Tomorrow" *Archiv des Völkerrechts* (1982) 20, 411, p. 422.

[111] ". . . persecution does not consist solely in physical torture; an essential element of persecution is harassment . . . Any repeated or sustained attack on not only a person's physical integrity, but also on his moral integrity, constitutes persecution . . .": *Juan Alejandro Araya Heredio*, Immigration Appeal Board Decision 76-1127, 6 January 1977, pp. 6-7, *per* J.-P. Houle; *Fernando Alejandro Cordova Seguel*, Immigration Appeal Board Decision 76-1157, 11 August 1977, p. 6; *Jose del Rosario Perez Gomez*, Immigration Appeal Board Decision M79-1179, 2 June 1980; *Andrzej Staniszewski*, Immigration Appeal Board Decision M87-1024X, 22 April 1987.

[112] Immigration Appeal Board Decision M87-1500X, 2 November 1987.

[113] *Ibid.*, p. 2, *per* J. Blumer.

[114] P. Weis, *supra*, note 17, *loc. cit.*, p. 970; I. Foighel, *supra*, note 104, *loc. cit.*, p. 221.

[115] UNHCR correctly confines Weis's principle to discriminatory situations: ". . . a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution (emphasis added)": UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) 14.

[116] See notes 80 and 81.

[117] Immigration Appeal Board Decision V80-6225, C.L.I.C. Notes 23.7, 30 July 1980.

[118] Immigration Appeal Board Decision V80-6220, C.L.I.C. Notes 30.11, 16 March 1981.

[119] *Ibid.*, p. 9, *per* W. Hlady.

[120] *Ibid.*, p. 9, *per* W. Hlady. Member Bruce Howard author of a powerful dissenting opinion in which he found that the claimant had suffered in an "unspeakable manner" and was "systematically tortured in body, mind and spirit": *ibid.*, p. 15, *per* B. Howard.

[121] Immigration Appeal Board Decision M83-1196, 7 November 1983; *Karthigesu Sivanesan*, Immigration Appeal Board Decision M84-1513, 7 January 1985, in which three arrests and detentions, one including torture, was considered to be insufficient evidence of persecution.

[122] See e.g. F. Marino-Menendez, *supra*, note 104, *op. cit.*, p. 354.

[123] Immigration Appeal Board Decision M73-2608, 30 April 1975.

[124] *Ibid.*, p. 24, *per* J. Scott.

[125] *Jim Martin Kwesi Mensah*, Immigration Appeal Board Decision V79-6136, 7 August 1979, p. 3, *per* C. Campbell; initially set aside on other grounds by Federal Court of Appeal Decision A-527-79, 2 May 1980, but ultimately affirmed on other grounds subsequent to rehearing in Federal Court of Appeal: (1981) 36 *N.R.* 332.

[126] *Omar Khan*, Immigration Appeal Board Decision V80-6223, C.L.I.C. Notes 25.9, 24 July 1980, p. 3, *per* C. Campbell.

[127] Immigration Appeal Board Decision M82-1265, 30 September 1983.

[128] *Ibid.*, p. 4, *per* R. Tremblay.

[129] F. Marino-Menendez, *supra*, note 112, *loc. cit.*, note 112, p. 354.

[130] ". . . of the Universal Declaration's 25 paragraphs dealing with specific rights, 6 were devoted to economic, social and cultural rights. In principle the emphasis attached to these rights by the socialist and some other countries had been recognized . . . In practice, however, the UN was to neglect economic, social and cultural rights as a serious field of endeavour for the next two decades . . . While the recent development of concern with economic rights has been interpreted by some commentators as resulting in 'the elimination of civil and political rights from serious international consideration', an attempt to restore balance into the treatment of the two sets of rights had in fact been long overdue": P. Alston, "The Universal Declaration at 35: Western and Passé or Alive and Universal?" *I.C.J. Review* (1983) 41, 60.

[131] S. Burke, "Compassion Versus Self-Interest: Who Should Be Given Asylum in the United States?" *Fletcher Forum* (1984) 8, 311, p. 320.

[132] *Ibid.*, p. 319.

[133] *Supra*, note 8, *op. cit.*, p. 137.

[134] See note 42.

[135] See note 43.

[136] See note 43, *loc. cit.*, art. 2 (1).

[137] *Idem*, art. 2 (2).

[138] ". . . in evaluating the performance of any state under the principle of progressive realization, would it not be proper to take into account a decision not to use available international assistance to meet social needs? . . . the legislative history of the Economic Covenant indicates that the broader meaning of 'available resources' was intended: the official history explicitly says that this clause was meant to include international aid": D. Trubek, *supra*, note 94, *op. cit.*, pp. 215-216.

[139] See note 94.

[140] ". . . refugees are challenging a policy . . . and a conception of refugeehood that denies special consideration to persons fleeing civil war or mass poverty attributable in part to policies of friendly authoritarian régimes": K. Brill, *supra*, note 8, *op. cit.*, p. 126.

[141] See note 43, art. 12.

[142] *Idem*, art. 13.

[143] This distinction can be traced to the 1938 Convention concerning the Status of Refugees coming from Germany, which excluded from refugee status those persons who had left Germany for "reasons of purely personal convenience": see note 1.

[144] "Clearly a person is not a refugee if that person is outside his or her own country simply because he or she is able to earn a better living in the new country": P. Hyndman, *supra*, note 14, *loc. cit.*, p. 149.

[145] Louis-Paul Mingot, (1973) 8 *I.A.C.* 351, p. 367, *per* J.-P. Houle, See also *Marc Michel Cylien*, Immigration Appeal Board Decision 73-12462, 21 March 1974 ("desire to find better economic conditions"); *Kulwant Singh*, Immigration Appeal Board Decision 77-1049, 25 April 1977 ("afraid of economic hardship"); and *Ismail Hassan Dembil*, Immigration Appeal Board Decision M80-1018, 7 March 1980 ("poor economic conditions"), set aside on other grounds by Federal Court of Appeal Decision A-163-80, 30 September 1980.

[146] M. Posner, "Who Should We Let In?" *Human Rts.* (1981) 9, 16, p. 18.

[147] M. Schulteis, "A Continent in Crisis: Migrants and Refugees in Africa", paper prepared for Conference on "The African Context of Human Rights" (1987, unpublished).

[148] *Ibid.*, p. 10.

[149] G. Jaeger, "The Definition of 'Refugee': Restrictive versus Expanding Trends" *World Refugee Survey* (1983) 5, p. 7; D. Anker and M. Posner, *supra*, note 36, *loc. cit.*, p. 67.

[150] See e.g. *Harbhajan Singh Washir*, Immigration Appeal Board Decision T79-9454, 7 December 1982, in which the Board commented adversely on the claimant's desire to seek employment in Canada; *Christolene Permaul*, Immigration Appeal Board Decision T83-9310, 13 April 1983, which pointed out the high rate of unemployment in the claimant's country of origin before dismissing her claim; and *Munir Mohamad Adem Suleiman*, Immigration Appeal Board Decision V81-6246, 16 November 1983, which recounts a series of serious threats against the claimant, a member of the Eritrean Liberation Front, but rejects his claim after noting that he wished the opportunity to go to school in Canada.

[151] *I.A.C.* (1974) 9, 323.

[152] *Ibid.*, p. 343.

[153] Federal Court of Appeal Decision A-730-79, 8 September 1980.

[154] See C. Wydrzynski, *Canadian Immigration Law and Procedure* 320 (1983). In some earlier international refugee accords, however, a threat against freedom, life or property was deemed to be of sufficient gravity to warrant protection: *see* Y. Shimada, *supra*, note 5, *loc. cit.*, p. 36.

[155] See note 41.

[156] Immigration Appeal Board Decision 79-1222, C.L.I.C. Notes 14.14, 13 December 1979.

[157] *Ibid.*, p. 2, *per* F. Glogowski.

[158] See R. Howard, "Contemporary Canadian Refugee Policy: A Critical Assessment" *Cdn. Public Policy* (1980) 6, 361, p. 363; See also *Josef Ligas*, Immigration Appeal Board Decision 75-10390, 19 December 1975; *Tadeusz Jakubowski*, Immigration Appeal Board Decision V79-6197, 4 October 1979; *Zdzislaw Liedtke*, Immigration Appeal Board Decision V80-6383, 10 December 1980; *Henryk Stanley Komisarski*, Immigration Appeal Board Decision V81-6162, 28 May 1981; *Jaroslaw Jozef Litwinski*, Immigration Appeal Board Decision V81-6322, 8 October 1981.

[159] Immigration Appeal Board Decision M87-1897X, 9 February 1988.

[160] *Ibid.*, p. 2, *per* J. Cardinal; *Andrzej Matuszewski*, Immigration Appeal Board Decision V80-6058, p. 2, *per* C. Campbell, reversed on other grounds by Federal Court of Appeal Decision A-163-80, 30 September 1980.

[161] *Helena Olearczyk* v. *Minister of Employment and Immigration*, *Imm. L.R.* (1990) 8, (2d) 18, p. 19, *per* Hugessen J.

[162] In the United States, for example, only "substantial economic disadvantage caused by the foreclosure of economic opportunity constitutes persecution under the refugee statutes": Note, "Political Legitimacy in the Law of Political Asylum", *Harvard L.R.*, (1985) 99, 450, p. 460; A. Fragomen, *supra*, note 23, *loc. cit.*, p. 54; D. Gross, *supra*, note 22, *loc. cit.*, p. 1135.

[163] See note 43, art. 11 (1).

[164] *Idem.*

[165] See generally J. Hathaway and M. Schelew, "Persecution by Economic Proscription: A New Refugee Dilemma" *Chitty's L.J.* (1980) 28, 190.

[166] See note 41.

[167] See note 43.

[168] Zink, for example, recognized "Protracted forced unemployment" as a form of persecution: B. Roberts, "Can the Boat People Assert a Right to Remain in Asylum?" *U. Puget Sound L.R.* (1980) 4, 176; A. Grahl-Madsen, *supra*, note 110, *loc. cit.*, p. 422: "States may still be prepared to regard economic proscription (on an individual basis and for clearly politi-

—so severe as to deprive a person of all means of livelihood—as persecution in
the Convention . . . "

. persecution . . . should include forms of economic harassment that make it im-
certain minorities to earn a living. Being prevented from earning a living is just as
cution as imprisonment": G. Gilbert, "Right of Asylum: A Change of Direction"
83) 32, 633, p. 645.

eral Court of Appeal Decision A-720-80, 27 February 1981, setting aside Immi-
eal Board Decision T80-9349, 2 October 1980. The claim was ultimately rejected
eration by the Immigration Appeal Board on 8 July 1981; *Alfredo Manuel Oyarzo*
C. (1982) 2, 779.

l., p. 2, *per* Urie J.

nigration Appeal Board Decision M79-1220, C.L.I.C. Notes 18.10, 13 December
ed on other grounds by Federal Court of Appeal Decision (1981) 34 *N.R.* 237, and
eme Court of Canada ((1982) 45 N.R. 116).

l., p. 6; *Toasz Gozdalski*, Immigration Appeal Board Decision M87-1027X,
87.

nigration Appeal Board Decision 76-1127, 6 January 1977; I. Foighel, *supra*,
221, in which persecution is said to include "lost work, imminent risk of not
o earn a livelihood, and reduced possibilities of work in relation to qualification."

l., pp. 6 and 7, *per* J.-P. Houle. But see the extremely narrow conceptualization of
roscription applied in the case of *Hua Kien Hui*, Immigration Appeal Board Deci-
81X, 21 July 1987, p. 6, *per* D. Anderson: ". . . even though Mr. Hui was classed
orities to be of landowner and [Kuomintang] class background, and was conse-
uired to work on a farm for four years in hard and unpleasant jobs, discrimination
does not, in itself, constitute a basis for a well-founded fear of persecution. Politi-
tion through manual labour, combined with indoctrination classes, is carried on,
y, in many countries and for many large social groups."

. (1983) 52, 67, setting aside Immigration Appeal Board Decision T82-9976,
1983. The claim was rejected on reconsideration by the Immigration Appeal Board
on of 6 January 1984.

l., p. 69, *per* Urie J.

l.

l.

note 43.

nigration Appeal Board Decision 81-9344, 12 November 1981.

nigration Appeal Board Decision 81-9474, 18 September 1981.

nigration Appeal Board Decision 79-1150, C.L.I.C. Notes 28.8, 13 November

l., p. 4, *per* J.-P. Houle; G. Goodwin-Gill, *supra*, note 34, *loc. cit.*, pp. 298 and
nding on the circumstances, persecution may thus comprise less overt measures
imposition of serious economic disadvantage, denial of access to employment, to
ons or to education . . .".

nigration Appeal Board Decision T83-9371, 25 April 1983 and 4 February 1985.

l., p. 4, *per* J.-P. Houle.

nigration Appeal Board Decision V84-6217, 24 October 1984.

l., p. 5, *per* D. Anderson.

nigration Appeal Board Decision M85-1709, 12 November 1987.

l., p. 4, *per* P. Davey.

BULLETIN OF HUMAN RIGHTS

91/1

I. Human rights and humanitarian law
II. Human rights and refugee law

UNITED NATIONS

Printed at United Nations, Geneva
GE.91-16412–March 1992–10,330

ISSN 0251-7019

Courtesy of the Centre for Human Rights